No. 75-978

In the Supreme Court of the United States

OCTOBER TERM, 1976

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.,
PETITIONERS

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (A. 240–251) [1] is reported at 528 F. 2d 1136. The opinion and order of the district court (A. 219–239) are reported at 383 F. Supp. 1244.

JURISDICTION

The judgment of the court of appeals (A. 252) was entered on December 30, 1975. The petition for

[1] "A." refers to the Appendix. "App. Br." refers to the separate Appendices to Petitioners' Brief. "A. Exh. Vol." refers to the Exhibit Volume of the Appendix.

a writ of certiorari was filed on January 12, 1976, and was granted on April 19, 1976 (A. 290). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[2]

1. Whether the Administrator of the Environmental Protection Agency may promulgate effluent limitations for existing industrial sources of water pollution, uniform within industrial classes, categories and subcategories, as national minimum requirements under Section 301 of the Federal Water Pollution Control Act Amendments of 1972.

2. Whether the courts of appeals have exclusive jurisdiction to review effluent limitations promulgated by the Administrator under Section 301 of the

[2] The court of appeals decided this case in two steps. The first decision ("*duPont I*") held only that the court of appeals rather than the district court had jurisdiction to review the actions of the Administrator of the Environmental Protection Agency here challenged. The second decision ("*duPont II*") decided the merits of petitioners' challenges to those actions (A. 253–286). The present petition involves only *duPont I*. It raises both the jurisdictional issue and the merits. The chemical company's petition in *duPont II* (No. 74–1473) raises the same questions. The government filed a cross-petition in *duPont II* (No. 75–1705), raising an additional question.

The Court granted the petition and the cross-petition in *duPont II* on June 21, 1976 (A. 291, 292). It consolidated the petition and cross-petition in *duPont II*, provided that *duPont II* be argued *in tandem* with *duPont I* (A. 291–292), but did not consolidate *duPont I* and *duPont II*.

The parties have agreed that their opening briefs in the present case will discuss both the jurisdictional and substantive questions which the petition in No. 75–978 and the chemical companies' petition in *duPont II* (No. 74–1473) raise. The government is filing a separate brief on the issue raised by its petition in *duPont II* (No. 75–1705).

Amendments, which includes jurisdiction to review the guidelines he promulgated under Section 304 in the same proceeding as the effluent limitations.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 *et seq.*, 33 U.S.C. (Supp. V) 1251 *et seq.*, and regulations promulgated thereunder, are reproduced in the separate appendices to petitioners' brief (App. Br. 1a–42a, 1b–79b, 1c–9c).

STATEMENT

This case involves Titles III, IV and V of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 844–896, 33 U.S.C. (Supp. V) 1251, 1311–1376 ("the Amendments"). These provisions establish methods and procedures for achieving the Amendments' declared objective: "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. (Supp. V) 1251(a). More particularly, the case concerns the relationship between "effluent limitations" promulgated under Section 301(b) of the Amendments, 33 U.S.C. (Supp. V) 1311(b), and "regulations providing guidelines for effluent limitations" under Section 304(b), 33 U.S.C. (Supp. V) 1314(b). We explain these terms more fully below.

A. THE BACKGROUND OF THE AMENDMENTS

The Amendments' origin and history were reviewed last Term in *Environmental Protection Agency* v.

California ex rel. State Water Resources Control Board, No. 74–1435, decided June 7, 1976 (hereinafter, *State Water Board*). The 1972 Amendments were "prompted by the conclusion of the Senate Committee on Public Works [3] that 'the Federal water pollution control program . . . has been inadequate in every vital aspect'" (*State Water Board, supra,* slip op. 3).

That program had relied upon (*id.* at 2–3)——

> ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters * * *. * * * The problems stemmed from the character of the standards themselves * * * rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards, and from the cumbrous enforcement procedures * * *
>
> [T]o strengthen the abatement system federal officials revived the Refuse Act of 1899, 30 Stat. 1152, 33 U.S.C. § 407, which prohibits the discharge of any matter into the Nation's navigable waters except with a federal permit. Although this direct approach to water pollution abatement proved helpful, it also was deficient in several respects: the goal of the discharge permit conditions was to achieve water quality standards rather than to require individual polluters to minimize effluent discharge, the permit program was applied only to industrial polluters, some dischargers were required to obtain both federal and state permits, and federal permit authority was shared by two federal agencies.[4]

[3] See S. Rep. No. 92–414, 92d Cong., 1st Sess. 5 (1971), in 2 Legislative History of the Water Pollution Control Act Amendments of 1972, Committee Print, Senate Committee on Public Works, 93d Cong., 1st Sess. 1423 (1973) (hereinafter "Leg. Hist.").

To remedy these deficiencies, Congress turned from primary reliance upon water quality standards, although these remain important,[5] to effluent limitations reflecting the least discharge of pollutants technologically practicable. They are to be imposed directly on the sources discharging pollutants. *Id.* at 3–4. Water quality standards define quality in terms of the body of water's designated use, and specify a maximum degree of tolerable pollution.[6] An effluent limitation sets the maximum amount of particular pollutants that a given source may discharge into a body of water.

Thus pollution control based primarily on water quality standards accepts discharge of wastes into a body of water, up to a level deemed to interfere with specified uses of the water, such as drinking, fishing, or swimming. Technology-based effluent limitations, in contrast, are grounded on the "view that all pollution is undesirable and should be reduced to the maximum extent that technology will permit." [7]

[4] The two agencies were the Corps of Engineers, which also was empowered to issue permits, and the Environmental Protection Agency, which was to advise the Corps with respect to water quality. Executive Order No. 11574, 35 Fed. Reg. 19627.

[5] As the Court has noted, water quality standards supplement effluent limitations so that more stringent standards may be imposed to preserve the level of local water quality. *State Water Board, supra,* slip op. 4, n. 12.

[6] Zener, *The Federal Law of Water Pollution Control,* in *Federal Environmental Law,* pp. 682, 693–694 (1974).

[7] Zener, *supra,* at p. 694.

B. THE STATUTORY SCHEME

1. THE GENERAL PROHIBITION AGAINST NON-COMPLYING DISCHARGES

Congress declared "the national goal that the discharge of pollutants * * * be eliminated by 1985," Section 101(a)(1), 33 U.S.C. (Supp. V) 1251(a)(1). To achieve this, in Section 301(a), 33 U.S.C. (Supp V) 1311(a), it prohibited any discharge except in accordance with effluent limitations and other restrictions. This section makes unlawful the discharge of any pollutant by any person except in compliance with the sections of the Amendments providing for effluent limitations, reports, inspection and monitoring, and mandatory permits.[8]

The Amendments define "effluent limitation" as any restriction established by a state or the Administrator on quantities, rates or concentrations of chemical, physical, biological or other constituents that are discharged from point sources, including schedules of compliance. Section 502(11), 33 U.S.C. (Supp. V) 1362(11). These restrictions are to be applied to discharges from existing point sources[9] (governed by Section 301(b)); from new point sources (governed by Section 306, 33 U.S.C. (Supp. V) 1316); and from sources of toxic pollutants (governed by Section 307 (a), 33 U.S.C. (Supp. V) 1317(a)). Restrictions that

[8] Section 301(a) provides: "Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

[9] A point source is a discrete outlet from which pollutants may be discharged. See Section 502(14), 33 U.S.C. (Supp. V) 1362(14).

are more stringent than the generally applicable limitations, based on state and federal water quality standards under Section 303, 33 U.S.C. (Supp. V) 1313, also are "effluent limitations" with which Section 301(a) requires compliance.

Under this major change in the methods of controlling water pollution, "a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform." *State Water Board, supra,* slip op. 4.

2. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The mandatory permits required by Section 301(a) are issued under the National Pollutant Discharge Elimination System ("NPDES") established by Section 402, 33 U.S.C. (Supp. V) 1342. This system is intended to operate under effluent limitations of general application. (*State Water Board, supra,* slip op. 5):

> An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. §§ 309 and 505, 33 U.S.C. §§ 1319, 1365 (Supp. IV). With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES

permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. § 402(k), 33 U.S.C. § 1342(k) (Supp. IV). In short, the permit defines, and facilitates compliance with and enforcement of, a preponderance of a discharger's obligations under the Amendments.

NPDES permits may be issued by the Administrator (Section 402(a), 33 U.S.C. (Supp. V) 1342(a)), or by a state which operates a permit program approved by the Administrator under specified statutory criteria (Section 402(b), 33 U.S.C. (Supp. V) 1342(b)) and guidelines issued by the Administrator under Section 304(h)(2). Both federal and state permits must "apply and insure compliance with" the sections of the Amendments providing for effluent limitations and standards, and must be for fixed terms not to exceed five years. Sections 402(a)(1), (b)(1)(A) and (B), 33 U.S.C. (Supp. V) 1342(a)(1), (b)(1)(A) and (B).[10]

[10] In *State Water Board*, *supra*, the Court also noted (slip. op. 8): "The EPA retains authority to review operation of a State's permit program. Unless the EPA waives review for particular classes of point sources or for a particular permit application, § 402(d)(3), (e), 33 U.S.C. § 1342(d)(3), (e) (Supp. IV), a State is to forward a copy of each permit application to EPA for review, and no permit may issue if EPA objects that issuance of the permit would be 'outside the guidelines and requirements' of the Amendments. § 402(d)(1), (2), 33 U.S.C. § 1342(d)(1), (2) (Supp. IV). In addition to this review authority, after notice and opportunity to take action, EPA may withdraw approval of a state permit program which is not being administered in compliance with § 402. § 402(c)(3), 33 U.S.C. § 1342(c)(3) (Supp. IV)."

3. EFFLUENT LIMITATIONS AND GUIDELINES FOR EFFLUENT LIMITATIONS

The technological basis for effluent limitations to be applied to existing point sources under Section 301 is to be defined under Section 304(b), 33 U.S.C. (Supp. V) 1314(b). This section directs the Administrator of the Environmental Protection Agency "for the purpose of adopting or revising effluent limitations," to publish "regulations providing guidelines for effluent limitations," to be annually revised, if appropriate. These regulations are to identify, in terms of amounts and constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control technology available for classes and categories of point sources, and to specify factors to be taken into account in determining the control measures and practices to be applicable to point sources within such categories or classes. Section 304(b) also enumerates certain economic, technological and nonwater quality environmental factors which must be considered.

The technological considerations defined under Section 304(b) are converted into effluent limitations under Section 301(b). That section directs that effluent limitations for existing point sources "be achieved" according to a timetable providing for standards of increasing stringency. The "[e]ffluent limitations established [under section 301] * * * shall be applied to all point sources of discharge of pollutants * * *." Section 301(e), 33 U.S.C. (Supp. V) 1311(e). Accord-

ing to the statutory time table, these limitations must, not later than July 1, 1977, "require the application of the best practicable control technology currently available as defined * * * pursuant to section 304(b) of this Act" (Section 301(b)(1)(A), 33 U.S.C. (Supp. V) 1311(b)(1)(A)). Not later than July 1, 1983, the limitations must "require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued * * * pursuant to section 304(b)(2) of this Act * * *" (Section 301(b)(2)(A), 33 U.S.C. (Supp. V) 1311(b)(2)(A)). However, the Administrator is authorized to modify the 1983 effluent limitations for individual dischargers who apply for permits after July 1977. Section 301(c), 33 U.S.C. (Supp. V) 1311(c).

The operation of this procedure is illustrated by the development of the effluent limitations challenged in this case. The administrative steps are described in detail *infra,* at pp. 14–21. For present purposes, it is sufficient to state that the Administrator developed technological information concerning effluent control and treatment in the inorganic chemicals manufacturing industry. He divided the industry into subcategories reflecting the components and amounts of pollutants in effluents discharged by plants manufacturing like products with like processes. He examined currently available treatment technologies used in the industry, as well as those used in other industries with similar wastes, to determine the degree to which application of the best of these, considered in the light of relevant engineering, economic and other practical factors listed in Section 304(b), will reduce the discharge of the pollutants within each subcategory.

After considering public comments on the initial technical analysis, the Administrator then proposed, again considered public comment upon, and adopted regulations setting forth specific numerical effluent limitations based upon the technological information developed.

A typical example of such an effluent limitation is found in the hydrogen peroxide manufacturing subcategory that uses the oxidation process (App. Br. 46b to 47b). In this subcategory, total suspended solids (TSS) which each point source may discharge per day were 0.8 kilograms ("kg") for each thousand kilograms ("kkg") of hydrogen peroxide produced. Total organic carbon was limited to a daily discharge of 0.44 kg per kkg of product.

Plants in this subcategory that use the electrolytic process discharge no organic carbon, but they do discharge cyanide. The technology for the electrolytic process permitted limits on TSS more stringent than for the oxidation process (0.005 kg per kkg of product per day). Discharge of dissolved cyanide was limited to 0.0004 kg per kkg of product daily. (App. Br. 46b to 77b.) 40 C.F.R. 415.92.[11]

[11] Limitations on the relative concentration of hydrogen ion which indicate acidity or alkalinity ("the pH factor") (A. Exh. Vol. 5934) were expressed as a fixed range reflecting the limits within which acidity or alkalinity may be practicably maintained.

4. ENFORCEMENT AND REVIEW

The Amendments provide for government and private enforcement of effluent limitations. The Administrator may issue an order or bring a civil action to remedy a violation of Section 301, and other sections establishing effluent limitations (*i.e.*, Sections 302, 306, 307), or to remedy a violation of any permit condition or limitation implementing such sections in a permit issued by the Administrator or a State.[12] Violators are subject to injunction and to civil penalties up to $25,000 per day; willful or negligent violation initially is a misdemeanor; repetition is a felony (Section 309(b), (c), (d), 33 U.S.C. (Supp. V) 1319(b), (c), (d)).

Any adversely affected person may institute an action in federal district court against any person "who is alleged to be in violation of * * * an effluent standard or limitation under this Act." Section 505(a), 33 U.S.C. (Supp. V) 1365(a). The term "effluent standard or limitation" is defined for purposes of that section to include an "effluent limitation or other limitation under Section 301 * * *" and other sections authorizing effluent limitations (Sections 302, 306, 307), and a permit or condition thereof issued under Section 402. Section 505(f), 33 U.S.C. (Supp. V) 1365(f).

[12] For enforcement purposes, Section 402(k), 33 U.S.C. (Supp. V) 1342(k), deems a permit holder who is in compliance with the terms of its permit to be in compliance "with sections 301, 302, 306, 307 and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health." 33 U.S.C. (Supp. V) 1342(k). See *State Water Board*, *supra*, slip op. 22–23.

In the case of a state permit, the Administrator may defer to state enforcement. Section 309(a).

The Administrator's action in approving or promulgating effluent limitations and standards under Section 301 and other sections, as well as in issuing or denying any permit, is subject to judicial review in the courts of appeals upon a petition filed within 90 days of such action. Section 509(b)(1), 33 U.S.C. (Supp. V) 1369(b)(1). Administrative action which is reviewable under this section is not subject to judicial review in civil or criminal enforcement proceedings. Section 509(b)(2), 33 U.S.C. (Supp. V) 1369(b)(2).

Section 304, which provides for regulations defining technological considerations in guidelines for effluent limitations (see pp. 8–11, *supra*) is not listed in Section 301(a) as one of the sections with which a discharger must comply in order lawfully to discharge any pollutant. It is not enumerated among the sections with which a permit must assure compliance under Section 402(a)(1) and (b)(1)(A).[13] Nor is it listed among the sections with which the government may enforce compliance in civil or criminal proceedings under Section 309, 33 U.S.C. (Supp. V) 1319, or which private citizens may enforce under Section 505, 33 U.S.C. (Supp. V) 1365. Further, regulations promulgated under Section 304 are not specifically identified among the actions of the Administrator subject to judicial review by the courts of appeals under Section 509(b), 33 U.S.C. (Supp. V) 1369(b).

[13] Those Sections are 301, 302, 306 and 307, each of which provides for a form of effluent limitation and 403, 33 U.S.C. (Supp. V) 1343, which deals with ocean discharges.

C. THE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS IN THIS CASE

1. THE PROMULGATION OF EFFLUENT LIMITATIONS FOR THE INORGANIC CHEMICALS MANUFACTURING INDUSTRY

The Amendments directed the Administrator to implement them as expeditiously as possible. They contemplate that after December 31, 1974, discharges from point sources will be in conformity with a permit, Section 402(k), 33 U.S.C. (Supp. V) 1342(k). To facilitate promulgation of limitations for existing point sources to meet the 1977 and 1983 requirements, Section 304(b) directed that the regulations providing technological guidelines for effluent limitations be published within one year of enactment.[14]

Two weeks after the enactment of the Amendments, the Administrator requested, on October 31, 1972, the submission of proposals for programs to aid him in developing technological guidelines and effluent limitations and standards for existing point sources (covered by Sections 301 and 304(b)) and new sources (covered by Section 306) for various industrial categories (R. 6016). Among these were the Inorganic Chemicals Manufacturing Point Source Category involved in this case (R. 6215).

The general directions accompanying the request (R. 6015–6281) required that each industry be divided

[14] See *Natural Resources Defense Council, Inc.* v. *Train*, 510 F. 2d 692, 696 (C.A.D.C.). Section 306(b)(1)(A), 33 U.S.C. (Supp. V) 1316(b)(1)(A), also directed that standards of performance be promulgated within one year for new sources in 27 specified industrial categories, one of which was the inorganic chemicals manufacturing industry.

into categories and subcategories, and that the technological factors to be applied under Sections 301 and 304(b) be identified. Those steps were intended to support the promulgation of effluent limitations by the Administrator.[15] The Administrator entered into a contract with a private firm to prepare a Development Document for Effluent Limitations Guidelines and Standards of Performance for the Inorganic Chemicals, Alkali and Chlorine Industries. In June 1973, the Administrator circulated the resulting draft development document for public comment (A. 1–20).

[15] The direction stated:

"[(R. 6027)] In order to promulgate the required guidelines and standards, it is first necessary to (a) categorize each industry; (b) characterize the waste resulting from discharges within industrial categories and subcategories; and (c) identify the range of control and treatment technology within each industrial category and subcategory. Such technology will then be evaluated in order to determine what constitutes the 'best practicable control technology currently available,' what is the 'best available technology economically achievable' and, for new sources, what is the 'best available demonstrated control technology.'

"In identifying the technologies to be applied under Section 301, Section 304(b) of the Act requires that the cost of application of such technologies be considered, as well as the non-water quality environmental impact (including energy requirements) resulting from the application of such technologies. It is imperative that the effluent limitations and standards to be promulgated by the Administrator be supported by adequate, verifiable data and that there be a sound rationale for the judgments made. Such data must be readily identifiable and available and such rationale must be clearly set forth in the documentation supporting the regulations.

* * * * * * *

"The end result of the analysis undertaken by contractors will be the suggestion of effluent limitations associated with the technology identified by the contractor * * *. [R. 6034.]"

On August 6, 1973, the Administrator published an "Advance Notice of Public Review Procedures" concerning rulemaking with respect to "effluent limitations guidelines," and standards of performance for new sources (A. 21). 38 Fed. Reg. 21202. This announcement described the basic legal authority for the regulations to be proposed, the agency's general methodology in implementing its effluent limitations and the means by which the agency was seeking to achieve "the widest possible public scrutiny of the technical and legal basis for the regulations to be established * * *," including the availability of the draft development reports on the various categories (A. 22). This advance notice expressly relied upon Sections 301(b) and 304(b) as authority for the regulations to be proposed for existing point sources (A. 22, 40).

On October 11, 1973, the Administrator published a formal notice of proposed rulemaking for effluent limitations guidelines,[16] new source standards of performance, and pretreatment standards, for the Inorganic Chemicals Manufacturing Point Source Category (A. 61–151). 38 Fed. Reg. 28174 *et seq.* The notice stated the statutory authority under which the rules were to be promulgated: Section 301(b) with respect to effluent limitations for existing point sources; Section 304(b) with respect to guidelines for these effluent limitations; Section 306 with respect to standards of performance for new sources; and Section

[16] The Administrator used the phrase "effluent limitations guidelines" to encompass his combination of action under Section 301(b) and Section 304(b) into a single proceeding.

307(c), 33 U.S.C. (Supp. V) 1317 (c), for pretreatment standards for new sources (A. 62–64). The notice explained the methodology which had been followed in developing the effluent limitations, and summarized the conclusions of the development document for the industry with respect to categories, process descriptions, water use and waste water characteristics, pollution control and treatment technology, and non-water quality (other environmental) aspects of pollution control (A. 65–82).

The notice explained that the diversity of the industry prevented establishment of one limitation for the entire industry, but that separate limitations for each plant would be inconsistent with the intent of the Amendments and unworkable. The Administrator therefore proposed limitations which were uniform within "workable subcategories consistent with [the industry's] variations" (A. 83).[17] Separate specific

[17] The notice stated (A. 83):

"The inorganic chemicals manufacturing category is very large and diverse. In establishing effluent guidelines it was necessary to consider numerous factors which may predicate varying the guidelines to accommodate differences in plant size, age, geographical location, manufacturing processes employed and product mix. Comments from various industrial concerns indicate that they feel these variables justify further segmentation of the industry. The key issue is the degree to which the inorganic chemicals manufacturing category should be segmented for the purpose of establishing effluent guidelines and standards of performance. One extreme is to establish one limitation for the entire industry. Examination of the dissimilarities in manufacturing processes and wasteloads generated for each chemical reveal that this approach is technically unsound. On the other extreme, each chemical plant is

limitations were proposed for each of 22 subcategories of the inorganic chemicals manufacturing industry, established on the basis of the product manufactured and significant variations in manufacturing processes. Within each subcategory, separate limitations were proposed for each pollutant which was to be controlled by the regulation. These subcategories ranged, in alphabetical order, from the aluminum chloride production subcategory to the titanium dioxide production subcategory (A. 61).

The notice invited interested persons to participate in the rulemaking proceeding by submitting within 30 days written comments on all aspects of the proposed regulations, including alternative proposals. In inviting the latter, the notice indicated the Administrator's view that he was required to issue effluent limitations under Section 301 (A. 88):

> In the event comments address the approach taken by the agency in establishing an effluent limitation guideline or standard of performance, EPA solicits suggestions as to what alternative approach should be taken and why and how this alternative better satisfies the de-

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unique and presents specific treatment problems. If the regulations presented herein are to reflect every variation, it is necessary to have separate guidelines for each plant. This approach does not reflect the intent of the Act and is unworkable.

"The approach selected was to examine all variables and segment the industry into workable subcategories consistent with these variations. Twenty-two subcategories have been established based on the chemical product manufactured. In cases where two dissimilar processes are used to manufacture the same product, separate limitations have been established within the subcategory."

> tailed requirements of sections 301, 304(b), 306 and 307 of the Act.

Several of the petitioners in this case objected to the proposed regulations on the ground that the Agency had proposed specific and uniform effluent limitations on a subcategory basis, rather than flexible "guidance" to be applied on a plant-by-plant basis by the issuers of permits under NPDES. *E.g.*, A. 155, 168–169, 188–189. The Assistant Administartor for Enforcement and General Counsel responded that the Agency would not "redirect its approach" and explained in greater detail the legal basis for the methodology underlying that approach (A. 192–198).

On February 4, 1974, EPA promulgated general provisions for effluent limitations to be applicable to all industrial categories (App. Br. 1c). 39 Fed. Reg. 4532 *et seq.*, 40 C.F.R. Part 401. These provisions included a statement of the scope and purpose of the effluent limitations guidelines, general definitions and the statutory authorization for such guidelines. The regulation cited Sections 301, 304, 306, 307, 316, and 402 as the legal basis of the Administrator's authority to promulgate effluent limitations for existing sources, standards of performance for new sources, and pretreatment standards for new and existing sources (App. Br. 3c, 7c–9c.). 40 C.F.R. 401.10, 401.12.

On March 12, 1974, the Administrator promulgated regulations specifying the effluent limitations for existing sources and standards of performance and pretreatment standards for new sources for the inorganic chemicals manufacturing industry (App. Br.

1b–79b). 39 Fed. Reg. 9612 *et seq.* The preamble again cited Sections 301, 304(b and c), 306(b and c), and 307 as the statutory basis for the Administrator's action (App. Br. 2b).[18] The Administrator summarized the comments of all participants and answered or commented upon each related group of comments. The preamble stated the revisions which had been made in the proposed regulations in light of the comments. The effluent limitations for each subcategory were expressed in terms of "single-number" quantities of pollutant which could be discharged per quantity of product per day. See p. 11, *supra*.

With the effluent limitations, the Administrator also published in final form the technological and economic basis upon which he had relied in developing them. The technological considerations were set forth in the "Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Major Inorganic Products Segment of the Inorganic Chemicals Manufacturing Point Source Category" (A. Exh. Vol. 5572), released March 1974.[19]

[18] It also referred to the notice of public review procedures of August 6, 1973, *supra*, p. 16, the notice of proposed rulemaking of October 11, 1973, *supra*, p. 16, and two development documents.

[19] This report specified subcategories within the industry (*id.* at 61), characterized water use and waste discharges within those subcategories (*id.* at 65); determined the characteristics of pollutants (*id.* at 183); and specified factors relating to control and treatment technology (*id.* at 189), including cost, energy and non-water quality aspects (*id.* at 229). It then described effluent reduction attainable through the application of the best practicable control technology currently available in each subcategory (*id.* at 313); and the effluent reduction attainable through application of the best available technology economically achieveable (*id.* at 331).

In April 1974, the Administrator published an "Economic Analysis of Effluent Guidelines for the Inorganic Chemical Industry" (A. Exh. Vol. 5419A). These two development documents were the final revised versions of earlier draft reports which had been circulated in connection with the proposed rulemaking. Together with the preamble to the regulations, and the regulations themselves, these documents set forth the "guidelines for effluent limitations" required by Section 304(b).

2. THE JUDICIAL PROCEEDINGS

Petitioners, eight chemical companies (Br. 1, n. 1), filed in the United States Court of Appeals for the Fourth Circuit timely petitions for review of the Administrator's action in promulgating the March 12, 1974, effluent limitations and new source standards, or intervened in such proceedings. See section 509(b)(1), 33 U.S.C. (Supp. V) 1369(b)(1). Insofar as existing sources were concerned, petitioners called their petitions for review "protective," contending that the Administrator had acted beyond his authority in promulgating single-number effluent limitations for such sources pursuant to Section 301(b), and that he was authorized only to promulgate flexible guidelines for effluent limitations under Section 304(b), to be

applied by issuers of permits to particular plants. Such guidelines, according to petitioners, were reviewable in the district courts rather than the courts of appeals.[20]

Some of the petitioners brought suit in the United States District Court for the Western District of Virginia raising the same issues as the petitions for review of the existing source regulations (A. 204). After briefing and argument, the district court dismissed for lack of jurisdiction, holding that the Administrator was authorized to promulgate effluent limitations under Section 301(b), that he had in fact done so, and that review of those regulations could be had only in the courts of appeals. *E. I. du Pont de Nemours and Co.* v. *Train,* 383 F. Supp. 1244 (App. 219–239).

Petitioners' appeal from that decision was consolidated with the pending petitions for review of both the new and existing source regulations. The court of appeals, however, rendered two separate decisions. In the first (*duPont I*), the court affirmed the district court's dismissal for lack of jurisdiction (App. 240–251. *E. I. du Pont de Nemours and Co.* v. *Train,* 528 F.2d 1136. In *duPont I,* the court separated the question of the Administrator's authority to issue

[20] Section 509(b)(1)(E), 33 U.S.C. (Supp. V) 1369(b)(1)(E), authorizes review in the courts of appeals of the Administrator's action, *inter alia,* "in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 * * *." Review of actions taken pursuant to Section 304 is not mentioned in Section 509.

regulations under Section 301 from the issue of jurisdiction. It held that even if the Administrator's authority derived only from Section 304, the promulgation of guidelines under that section, because of the close interrelationship between Sections 301 and 304, was an "action 'in approving or promulgating any effluent limitation * * * under [section] 301'" (A. 246) and, accordingly, reviewable in the courts of appeals under Section 509(b)(1)(E), 33 U.S.C. (Supp. V) 1369(b)(1)(E).

In the second decision (*duPont II*) (App. 253–286), the court of appeals decided the merits of the questions presented in the petitions for review. The court held that the Administrator was authorized to promulgate effluent limitations under Section 301, that he had permissibly promulgated such regulations simultaneously with the promulgation of effluent guidelines under Section 304(b), and that the regulations need not take the form of "ranges" of discharge levels but could instead be issued as single-number limitations (see *infra,* pp. 48–53). The court further held that, for both existing and new sources, the Administrator's regulations are only "presumptively applicable," and that any source may, at the time of permit-issuance, rebut the application of the presumption to that particular plant.[21]

[21] The government's contention that the court's rule of "presumptive applicability" should not apply to new sources is the subject of its cross-petition in No. 75–1705.

Some of the regulations apply to more than one subcategory. The court set aside portions of those regulations dealing with "process waste water" and "process waste water pollutants" and with "catastrophic rainfall." The court also set aside portions of particular regulations dealing with 11 chemical products, on the ground that they were not adequately supported by the administrative record. Those rulings are not here challenged.

SUMMARY OF ARGUMENT

I

The language and structure of the 1972 Amendments show that the Administrator is authorized to promulgate generally applicable effluent limitations for existing point sources under Section 301(b). Contrary to petitioners' contentions, Congress did not intend that effluent limitations are to be established only in individual permit proceedings under Section 402 by application of the Administrator's Section 304(b) guidelines to the particular discharger.

This is shown by the language of Section 301 itself, which not only directs that effluent limitations "established pursuant to this section" shall be applied to all point sources (Section 301(e)) but expressly provides for waiver by the Administrator of the 1983 level effluent limitations upon a proper showing (Section 301 (c))—a provision which would be surplusage under petitioners' view. Other sections also reflect the prem-

ise that the Administrator will establish generally applicable limitations. Indeed, Section 304(b) directs that "[f]or the purpose of adopting or revising effluent limitations under this Act the Administrator shall * * * publish * * * regulations providing guidelines for effluent limitations." This indicates that it is the Administrator who is to adopt or revise the limitations required by Section 301. The same understanding is also reflected in the provisions establishing the state and federal permit systems (Section 402(a)(1), 402(b)); and in the requirement in Section 510, 33 U.S.C. (Supp. V) 1370, that states may not adopt less stringent effluent limitations than those in effect under the Amendments.

Finally, the statutory provisions for citizen enforcement suits (Section 505(a)(1), (f)(2), 33 U.S.C. (Supp. V) 1365 (a)(1), (f)(2)), and judicial review (Section 509(b)(1)) expressly refer to effluent limitations under Section 301. Section 509(b)(1) in fact provides for review "of the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 301 * * *."

Although the Amendments provide procedures for the enforcement of the requirments of Section 301, and requires that permits comply with applicable requirements thereunder, it nowhere expressly provides that guidelines published under Section 304(b) may be enforced, or reviewed, or must be incorporated into permits under Section 402.

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Petitioners' arguments that only permit-issuers may establish effluent limitations are based upon hypertechnical or insignificant distinctions in the wording of the various sections of this complex statute. Section 304(b), upon which they heavily rely, does not support their position. That section does not confine the Administrator to publication of guidelines that state a numerical range of permissible effluent limitations to be selected and applied only by permit issuers in individual proceedings. Neither Section 304(b) nor Section 402 even refers to a "range" requirement. Moreover, the "range" for the industry as a whole is supplied by the differences among the effluent limitations for the various subcategories.

Insofar as Section 304(b) requires the Administrator to specify factors to be considered in establishing effluent limitations, Congress intended such specification to reflect his determination of the relevant technological criteria he is to apply in establishing effluent limitations under Section 301. It did not intend that the factors specified be reconsidered by permit issuers in individual permit proceedings, as petitioners assert.

The legislative history of the 1972 Amendments, particularly the Conference Report and the explanations of it, confirms that Congress intended the Administrator to establish nationally uniform minimum effluent limitations under Section 301(b) on the basis of industrial subcategories, not on a plant-by-plant basis through the issuance of permits, and that

it intended the effluent limitations to be uniform within each subcategory. In this way it sought to reduce the discharge of pollutants under a strict nationwide time table with which all dischargers would comply. This clearly defined policy would be defeated if effluent limitations could be established only in individual permit proceedings under Section 402, as petitioners contend.

The establishment of uniform national effluent limitations by the Administrator does not curtail or weaken the role Congress intended the states to have in the administration of the Amendments. The states still perform important functions, particularly in determining whether a particular existing point source comes within a subcategory and whether it qualifies for a variance from the generally applicable standards under Section 301, and in establishing its schedule for compliance. Moreover, the states retain the important power to adopt more stringent limitations than those established by the Administrator.

II

Because of the close inter-relationship between the guidelines under Section 304(b) and the effluent limitations under Section 301, the Administrator, for reasons of time and efficiency, combined the establishment of guidelines and effluent limitations into a single proceeding, at the end of which he made a single determination embodying the guidelines and the effluent limitations. This Court approved a similar combina-

tion of separate steps into a single administrative proceeding, adopted for reasons of administrative practicality, in *Federal Power Commission* v. *Moss*, 424 U.S. 494. Moreover, the requirements of Section 304(b) were satisfied by the development documents containing the technological data, the preamble to the formal regulations in issue, and the regulations themselves, which specify "the degree of effluent reduction attainable" as required by Section 304(b)(1)(A), (b)(1)(B), (b)(2)(A), and (b)(2)(B).

III

Petitioners err in contending that since the Administrator has no authority to establish effluent limitations under Section 301, the courts of appeals have no jurisdiction to review them. First, he has such authority. Second, the court of appeals' statutory jurisdiction to review effluent limitations under Section 509(b)(1) necessarily includes jurisdiction to determine whether the Administrator has power to establish them. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415.

The effluent limitations under Section 301 and the guidelines under Section 304(b) were established in a single proceeding and are inextricably intertwined. They may be reviewed in a single proceeding by the court of appeals. Review of the guidelines in the district courts and the effluent limitations in the courts of appeals, as urged by petitioners, would result in a bifurcated system of review producing confusion and delay in achieving the congressional requirement that existing point sources comply with strict, technology-based effluent limitations by 1977, stricter limitations by 1983, and would defeat attainment of the statutory goal to eliminate the discharge of pollutants by 1985.

ARGUMENT

I

SECTION 301 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS EMPOWERS THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY TO SET, FOR VARIOUS SUBCATEGORIES OF PARTICULAR INDUSTRIES, UNIFORM NATIONAL EFFLUENT LIMITATIONS FOR EXISTING POINT SOURCES OF POLLUTANTS

INTRODUCTION

Although the statutory provisions involved in this case are complex and intricate, the underlying legal issue is relatively simple. Section 301 of the Amendments provides for the establishment of "effluent limitations" for "all point sources of discharge of pollutants." Section 304(b) requires the Administrator of the Environmental Protection Agency, "[f]or the purpose of adopting or revising effluent limitations under this Act," to publish "regulations, providing guidelines for effluent limitations." Section 402 provides for the issuance of permits by the Administrator or by a state (under a state permit program approved by the Administrator) "for the discharge of any pollutant, or combination of pollutants," upon condition that such

discharge will meet the requirements of specified sections of the Amendments relating to the discharge of pollutants, including Section 301 but not Section 304.

The major question in the case is whether the Amendments empower the Administrator to adopt generally applicable effluent limitations for subcategories of industries that set a specific numerical limit upon the amount of a particular pollutant that all members of the subcategory may discharge—limitations which will then be incorporated in the individual permits that the Administrator or a state will issue to each point source, *i.e.*, to each individual discharger. Petitioners contend that the Administrator has no authority to issue such effluent limitations under Section 301, and that the only method by which effluent limitations may be established under Section 301 is through the application by permit-issuers of technological data specified in Section 304 guidelines. This is to be accomplished, according to petitioners, on a plant-by-plant basis in individual permit-issuance proceedings in which the permit-issuing authority establishes the precise numerical amount of polluting substances each point source may discharge.

Thus, in petitioners' view the effluent limitations may be established only in each of the 40,000 or more individual permits to be issued to existing point sources.[22] The government submits—as six of the seven

[22] As of June 30, 1976, the Environmental Protection Agency's Formal Planning and Reporting System showed that 42,064 industrial permits had been issued or applied for.

courts of appeals that have considered this question have held [23]—that the Administrator's authority is not so moribund, and that he may adopt generally applicable effluent limitations under Section 301 that set the precise numerical amount of permissible pollution for subcategories of industry.

The basic design of the Amendments was to provide for the development of national standards by which pollution of our waters would be controlled and reduced and, by 1985, hopefully eliminated (Section 101(a), "declarations of goals and policy"). Earlier attempts to deal with the water pollution problem had failed, because both the methods used in the prior legislation to improve water quality and the federal permit system under the Refuse Act of 1899 had proved inadequate. In the 1972 Amendments, Congress adopted a new approach.

It undertook to control water pollution at the pollution source by directly limiting the amount of pollutants discharged to the minimum that technology

[23] In addition to the Court of Appeals for the Fourth Circuit in the present case, the District of Columbia, Second, Third, Seventh, and Tenth Circuits have upheld the Administrator's authority. *American Frozen Food Institute* v. *Train*, C.A.D.C., Nos. 74–1464, 74–1513, 74–1840, decided May 11, 1976; *Hooker Chemicals & Plastics Corp.* v. *Train*, 537 F. 2d 620 (C.A. 2); *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F. 2d 1027 (C.A. 3); *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442 (C.A. 7); *American Petroleum Institute* v. *Environmental Protection Agency*, C.A. 10, Nos. 74–1465, 74–1466, 74–1621, 74–1622, decided August 11, 1976. Only the Eighth Circuit has held to the contrary. *CPC International Inc.* v. *Train*, 515 F. 2d 1032.

permits. It thus shifted the approach to the problem from the prior emphasis on water quality to technology-based effluent limitations designed to restrict and ultimately to end the discharge of pollutants into our navigable waters.

The 1972 Amendments adopted a three-part plan to deal with pollution from existing sources. First, it was necessary to identify the particular pollutants that were creating the problem in particular industries, to ascertain and evaluate the best technology available and acceptable to control such pollution, and to estimate the extent of the control of pollution that such technology could achieve by designated target dates. This initial aspect of the program was dealt with in Section 304, which required the Administrator by specified dates to develop and publish information about the causes of pollution and the best available technology for dealing with it. The guidelines are required to "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources" and to "specify factors to be taken into account in determining the control measures and practices to be applicable to point sources * * * within such categories or classes."

The next step in the program—the conversion of the technological information set forth in the guidelines into binding, enforceable pollution limitations—

was to be accomplished through the promulgation of "effluent limitations" by the Administrator under Section 301. The purpose of the effluent limitations was to translate into specific figures the maximum permissible pollution by particular classes and categories of polluters. The effluent limitations thus were based upon and reflected the technological data developed under Section 304(b).

Finally, the effluent limitations under Section 301 were to be applied to the approximately 40,000 existing industrial point sources through the NPDES permit system. The permits to be issued either by the Administrator or by the state under a permit program the Administrator had approved, would specify maximum permissible levels of pollution for each individual discharger through the application of the effluent limitations to the particular point source. State-issued permits at a minimum must meet the federally-prescribed effluent limitations; the state, however, may itself impose more stringent limitations (Section 510).

As we shall show, both the language and the structure of the Amendments demonstrate that Congress authorized the Administrator to promulgate effluent limitations on the basis of industrial subcategories that specify precise levels of permissible pollution for all firms in the subcategory. We shall also show that the legislative history of the 1972 Amendments confirms that the Administrator has this authority. This history shows that Congress explicitly intended that the Administrator would set effluent limitations on

this basis, and that he is not required to depend on the issuance of individual permits in order to establish for individual point sources the specific requirements for controlling pollution in the particular industrial subcategories that are specified in the guidelines.[24] It further shows that Congress intended there to be uniform national effluent limitations governing all members of the particular subcategory—an objective that could not be accomplished if the only method by which effluent limitations could be applied is through the permit system.

Finally, we shall show that the fact that in this case the Administrator promulgated the guidelines and adopted the effluent limitations in a single proceeding was a permissible exercise of his broad statutory authority to take effective measures "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a) of the Amendments).

This Court has recognized that the Administrator's interpretation of the Water Pollution Control Act, like his interpretation of the Clean Air Act, is entitled to considerable weight if it is "reasonable" and there is no "cogent argument that it is contrary to congressional intentions * * *." *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board,* No. 74–1435, decided June 7,

[24] If uniform limitations have not yet been issued for a particular industrial category, the Amendments provide that the Administrator may issue a permit containing "such conditions as * * * are necessary to carry out the provisions of this Act." Section 402(a)(1).

1976, slip op. 26 (Water Act); *Union Electric Co.* v. *Environmental Protection Agency,* No. 74–1542, decided June 25, 1976, slip op. 8 (Clean Air Act); *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 75 (Clean Air Act). Since the Administrator's construction of the 1972 Amendments satisfies both of these criteria, the Court should uphold it.[25]

A. THE LANGUAGE AND STRUCTURE OF THE AMENDMENTS SHOW THAT THE ADMINISTRATOR IS AUTHORIZED TO PROMULGATE EFFLUENT LIMITATIONS UNDER SECTION 301(b)

Numerous provisions of the statute, as well as its overall structure and design, show that the Adminis-

[25] Petitioners contend (Br. 73–75) that the Administrator's interpretation is entitled to little, if any, weight because it was not contemporaneous or consistent, but rather constituted a change from his alleged original intention not to establish effluent limitations under Section 301(b) but only to establish guidelines. From the outset, however, the Administrator contemplated promulgating effluent limitations under Section 301(b). As detailed in the Statement (pp. 14–21, *supra*), two weeks after the enactment of the Amendments the Administrator requested the submission of proposals to aid him in developing both guidelines under Section 304(b) and effluent limitations under Section 301. Throughout the remainder of the proceedings, the various public notices specifically referred to both sections, and the Administrator's final action was taken under both of them. Although the Administrator initially may have stressed the Section 304 guidelines—because of the requirement that they be promulgated within one year after the enactment of the Amendments (Section 304(b))—from almost the date of the enactment of this legislation the Administrator had made clear his intention to establish both guidelines under Section 304(b) and effluent limitations under Section 301(b) and he did precisely that, combining the two steps in a single set of regulations.

trator is authorized to promulgate effluent limitations under Section 301(b).

1. THE LANGUAGE OF VARIOUS PROVISIONS OF THE AMENDMENTS SHOWS THAT THE ADMINISTRATOR HAS AUTHORITY TO ESTABLISH EFFLUENT LIMITATIONS UNDER SECTION 301(b)

a. The starting point is Section 301 itself. It provides that there shall be achieved by July 1, 1977, "effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act," and by July 1, 1983, "effluent limitations for categories and classes of point sources," which also are to be based upon the Administrator's guidelines under Section 304(b) (Section 301(b)). Subsection (e) states:

> Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

These provisions unequivocally provide that "effluent limitations" are to be established under Section 301. Those limitations are separate and distinct from the requirement in Section 402 that permits to be issued for the discharge of pollutants by point sources will "meet * * * all appropriate requirements under section 301 * * *." Indeed, the obvious intendment of Section 402 is that permits cannot be issued unless they require compliance with the "[e]ffluent limitations established" under Section 301 (Section 301(e)).

Although Section 301 does not explicitly provide

that it is the Administrator who is to establish the effluent limitations, that is its clear and necessary implication. As shown below, Congress intended that the effluent limitations be established on a uniform national basis (pp. 59–67); only the Administrator is capable of accomplishing that objective. Uniform effluent limitations could not be achieved if the only way to impose them was by the particularization of the guidelines promulgated under Section 304 in the 40,000 permits for existing point sources, a large number of which will be issued by the 27 states that now have approved permit programs (Pet. Br. 6, n. 9).[26]

The Administrator's authority to establish generally applicable effluent limitations under Section 301 is confirmed by his power under Section 501(a), 33 U.S.C. (Supp. V) 1361(a), of the Amendments "to prescribe such regulations as are necessary to carry out his functions under this Act." When a statute confers such authority, "the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, quoting with approval *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280–281.

Unless Section 301 authorizes the Administrator to promulgate effluent limitations for categories of point sources, one subsection of that section would be surplusage. Section 301(c) provides that "[t]he Adminis-

[26] The Administrator has also approved a permit-issuing program for the Virgin Islands. 41 Fed. Reg. 30383.

trator may modify the requirements of subsection (b)(2)(A) of this section [requiring the achievement by 1983 of 'effluent limitations for categories and classes of point sources'] with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing" that the modification represents "the maximum use of technology within the economic capability of the owner or operator" and "will result in reasonable further progress toward the elimination of the discharge of pollutants." This provision authorizes the Administrator to grant relief on a case-by-case basis from the general effluent limitations then in effect, in order to allow a permit to impose less stringent requirements.

If the only way that effluent limitations could be imposed were through the permit procedures, there would be no need for a statutory provision authorizing the Administrator to exempt from effluent limitations a particular point source for which a permit is sought. As the Court of Appeals for the Third Circuit has noted, "§ 301(c) itself seems to support the Administrator's position by presupposing the existence of a section 301 effluent limitation which the Administrator can relax." *American Iron & Steel Institute* v. *Environmental Protection Agency, supra,* 526 F. 2d at 1037, n. 15.

b. Section 302, to which, as noted, Section 301(c) refers, deals with effluent limitations designed to attain or maintain water quality. It provides that whenever the Administrator concludes that discharges of pollutants from a point source or group of point

sources "with the application of effluent limitations required under section 301(b)(2) * * * would interfere with the attainment or maintenance of [the requisite quality of water in particular waters]," then "effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established." Section 302(b)(1) provides that "[p]rior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitations" and hold a hearing. Section 302(c) provides that the establishment of water-quality related limitations "shall not operate to delay the application of any effluent limitation established under Section 301 * * *."

Section 302 thus unequivocally provides that the Administrator is to establish effluent limitations under that section designed to deal with the special impact upon water quality of the discharge of pollutants by particular point sources. It would be anomalous for Congress to have given him this authority to deal with the special situation covered by Section 302 but to have denied him the authority to promulgate the general effluent limitations required under Section 301, to which Section 302(c) expressly refers.

c. Section 304—the guideline section—itself recognizes the authority of the Administrator to promulgate effluent limitations under Section 301. Section 304(b) directs that, "[f]or the purpose of adopting or revising effluent limitations under this Act the Administrator shall * * * publish * * * regulations, pro-

viding guidelines for effluent limitations." The requirement that the Administrator publish guidelines "[f]or the purposes of adopting * * * effluent limitations under this Act" indicates that it is the Administrator who will adopt the effluent limitations expressly required by Section 301 for "classes and categories of point sources,"[27] and that those effluent limitations will apply the standards and principles set forth in the guidelines.

d. Section 401(a)(1) requires an applicant for a federal permit to submit a certification from the state involved that the discharge will comply with, among other provisions, Section 301 or, in the case of "any such activity for which there is not an applicable effluent limitation * * * under [section] 301(b)," the state must so certify. This requirement recognizes that there will be effluent limitations established under Section 301(b) which the discharge authorized in a federal permit issued subsequent to the establishment of the effluent limitations must satisfy.

e. The permit provisions in Section 402 of the Amend-

[27] The "effluent limitations" to be achieved by July 1977 are "for point sources," whereas those to be achieved by July 1983 are "for classes and categories of point sources." The difference in language, however, does not indicate that for the earlier period the "effluent limitations" were to be established for each individual point source separately, through the permits to be issued for them and that effluent limitations for "classes and categories of point sources" were not to be achieved until 1983. The omission of the term "classes and categories" from Section 301(b)(1)(B) is of no significance, because Section 304(b) requires "guidelines for" classes and categories both in 1977 (Section 304(b)(1), 33 U.S.C. (Supp. V) 1314(b)(1)), and 1983 (Section 304(b)(2), 33 U.S.C. (Supp. V) 1314(b)(2)).

ments recognize that under Section 301—as under Sections 302, 306 and 307—effluent limitations will be established. The Administrator may issue permits, and approve state permit programs, only if such permits meet the "applicable requirements" of those four sections. The major requirement of those four sections, as we have noted, is the effluent limitations that the Administrator has promulgated thereunder.

f. Section 510 states that the Act ~~Amendments~~, 33 U.S.C. (Supp. V) 1317, does not bar the states from "adopt[ing] or enforc[ing] (A) any standard or limitation respecting discharges of pollutants." It provides, however, that any state "effluent limitation" or other limitation or prohibition shall not be less stringent than any "effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance * * * in effect under this Act." The "effluent limitation[s] * * * in effect under this Act" necessarily are the generally applicable limitations for industrial categories established under Section 301 and the other sections providing for effluent limitations (Sections 302, 306, 307). They could not be the particular limitations on individual discharges contained in state-issued permits, or the section would be meaningless.

g. Finally, the statutory provisions for citizen enforcement suits and judicial review explicitly recognize the Administrator's authority to adopt effluent limitations under Section 301. Section 505(a)(1) permits any citizen to bring a civil action against any person "who is alleged to be in violation of (A) an effluent

standard or limitation under this Act * * *." For purposes of Section 505, the term "effluent standard or limitation" is defined to include "an effluent limitation or other limitation under Section 301 or 302 of this Act" (Section 505(f)(2)). Section 509(b)(1) provides for judicial review in the court of appeals "of the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 301, 302 or 306 * * *."[28] The former provision thus recognizes that effluent limitations will be established under Section 301, and the latter provision explicitly indicates that it is the Administrator who will promulgate them.

The foregoing provisions for citizen enforcement and for judicial review also explicitly provide for enforcement of permit requirements under Section 402.[29]

[28] Petitioners argue (Br. 82–83) that the term "approving * * * any effluent limitation" refers to the failure of the Administrator to veto a state permit under Section 402(d) and was designed to provide opportunity for federal court review of state permits. They ignore, however, the reference to the "promulgating" of an effluent limitation; their explanation of this provision would not cover the latter situation. Moreover, it is unlikely that Congress intended by this language to provide for judicial review of the Administrator's refusal to veto a state permit. On the contrary, this provision was designed to permit review of the Administrator's affirmative action in "approving or promulgating any effluent (or other) limitation." The failure to veto a state permit would not normally be viewed as an approval of it. *Mianus River Preservation Committee* v. *Environmental Protection Agency*, C.A. 2, No. 75–4253, decided July 12, 1976 (state-issued permit not reviewable as Administrator's action under Section 509).

[29] See Section 505(f)(6), defining "effluent standard or limitation" for the purpose of citizens' suits to include "a permit or condition thereof issued under Section 402 of this Act,"; and Section 509(b)(1)(F), providing court of appeals review of the Administrator's action "in issuing or denying any permit under Section 402."

If, as petitioners contend, effluent limitations could be established and applied only in permits under Section 402, the provisions for review and enforcement of Section 301 effluent limitations would be surplusage, contrary to the familiar principle that statutes must be read to give effect to each provision. *United States* v. *Menasche*, 348 U.S. 528, 538–539; *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F. 2d 1027 (C.A. 3); *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442 (C.A. 7).[30]

[30] The Eighth Circuit attempted to avoid this problem by treating the references to Section 301 in the enforcement and review sections as limited to Section 301(f), which prohibits discharge of poison warfare agents and high level radiological wastes. *CPC International Inc.*, *supra*, 515 F. 2d at 1043. Section 502(11) defines an effluent limitation as "any restriction established by a State or the Administrator * * *." Since the restriction on discharge of poison warfare agents and radiological waste is established by the statute itself and not by the Administrator, it is not an effluent limitation. It is therefore "another limitation" under the provisions in Sections 505(a)(1) and 505(f) that authorize citizen suits to enforce "an effluent limitation or other limitation under Section 301 or 302 of this Act." *American Iron & Steel Institute*, *supra*, 526 F. 2d at 1038. The references in the citizens enforcement and judicial review provisions to the "effluent limitations" under Section 301 therefore are to something other than the absolute prohibition in Section 301(f) against the discharge of any poison warfare agents or radiological wastes. As we have shown in the text (*supra*, pp. 41–42), they are to the effluent limitations established by the Administrator under Section 301(b).

Petitioners contend (Br. 80) that the reference in Section 505(f)(2) to "effluent limitation or other limitation under Section 301" is to individual variances from the effluent limitations under that section that may be granted to permit holders under Section 301(c); and that the citizen suits that may be brought

2. THE INTERRELATIONSHIP AMONG VARIOUS PROVISIONS OF THE AMENDMENTS CONFIRMS THE ADMINISTRATOR'S AUTHORITY TO ESTABLISH EFFLUENT LIMITATIONS UNDER SECTION 301(b)

The interrelationship among the provisions of the Act dealing with effluent limitations (Sections 301, 302, 306, 307), guidelines for such limitations (Section 304), federal enforcement (Section 309) and permits (Section 402), confirms that the Administrator has authority to establish effluent limitations under Section 301, and is not limited to promulgating guidelines for such limitations under Section 304, which are to be applied to particular point sources solely through permits.

Section 301(a) makes unlawful the discharge of any pollutant "[e]xcept * * * in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act." Section 309(a) authorizes the Administrator to enter a compliance order and to seek injunctive relief against any person who violates "section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by [him] or by a State"; it also imposes civil penalties for violation and criminal penalties for willful and negligent violation of those provisions or of such permits (Sections 309(c)(1), 309(d)). Finally, Sections 402(a)(1) and 402(b)(1)(A) and (B) require that permits issued by the Administrator or State must comply with all "applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act."

The significant thing about these provisions for this case is that none of them requires compliance with the guidelines promulgated under Section 304, authorizes enforcement proceedings against noncompliance therewith, or makes such noncompliance illegal. Discharges of pollutants and permits for such discharges are required to comply with the effluent limitations in Sections 301, 302, 307 and 308, not with the guidelines for such limitations under Section 304.[31]

Petitioners' argument grossly distorts and upsets the entire statutory plan, since it authorizes only the

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under Section 505(a) to challenge effluent limitations may challenge only such variances. Although Section 505(f) defines an effluent limitation to include "a permit or condition thereof," a citizen suit relating to the variance presumably would challenge the relaxation of the effluent limitation under Section 301(b) that the variance sanctions. Such a challenge would not appear to be a claim of violation of the effluent limitation but rather a challenge to the variance from the limitation. Similarly, the Administrator's grant of a variance under Section 301(c) would not appear to be challengeable as "a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator," which a citizen may challenge under Section 505(a)(2).

The grant of a variance under Section 301(c) is reviewable in the court of appeals under Section 509(b)(1)(E) and (F) as an action "in approving * * * any effluent limitation or other limitation under section 301 * * *" or "in issuing or denying any permit under section 402," and not in a citizen suit under Section 505(a). Whether a citizen could maintain an action challenging such variance would depend upon whether he is an "interested party" under Section 509(b)(1).

[31] Section 402(d)(2), 33 U.S.C. (Supp. V) 1342(d)(2), empowers the Administrator to veto permits "outside the guidelines and requirements of this Act." However, the term "guidelines" here refers to guidelines under Section 304(h), concerning uniform monitoring, reporting and information requirements, not to Section 304(b). See section 402(c)(2), 33 U.S.C. (Supp. V) 1342(c)(2).

promulgation of nonenforceable guidelines for effluent limitations without the binding and enforceable limitations themselves which the permits are required to meet. Congress certainly did not intend to leave such a gaping loophole in the statute when it provided in Section 301(e) that "[e]ffluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

3. THE OTHER STATUTORY PROVISIONS UPON WHICH PETITIONERS RELY ARE NOT INCONSISTENT WITH THE ADMINISTRATOR'S AUTHORITY TO ESTABLISH EFFLUENT LIMITATIONS UNDER SECTION 301(b)

Petitioners seek to avoid the compelling effect of the foregoing analysis by a series of hypertechnical arguments that focus on minor distinctions in the wording of various sections of the Act, largely ignore the basic structure and design of the statute, and would seriously weaken the effectiveness of the Amendments to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)).

Petitioners point out (Br. 58–59) that Section 306 (b)(1)(B) requires the Administrator to "propose and publish regulations establishing Federal standards of performance for new sources * * *." They argue that where Congress desired uniform national standards, as in the case of new sources (Section 306), it used the term "standards," and that the absence of that term in Sections 301 and 304 indicates that in those sections Congress did not contemplate a uniform standard for the entire country.

This semantic distinction, however, does not refute the numerous statutory provisions discussed above which recognize the authority of the Administrator to promulgate effluent limitations on a national basis. Moreover, the argument incorrectly assumes that Congress intended the terms "limitation" and "standard" to have substantially different meanings. To the contrary, the statute as a whole shows that Congress used these terms as equivalents, and did not intend the use of one or the other to affect the scope of the Administrator's authority.

For example, as shown above (p. 6), the "standards of performance" to be established for new sources under Section 306(b), as restrictions on discharge, are "effluent limitations." Section 502(11), 33 U.S.C. (Supp. V) 1362 (11). Section 316 dealing with thermal pollution, refers in subsection (b) to "[a]ny standard established pursuant to section 301 or section 306 * * *."[32] Section 509(b)(1)(E), however, provides for judicial review of the Administrator's action in approving or promulgating "any *effluent limitation* or other limitation under Section 301, 302 *or 306*" (emphasis added). See *American Meat Institute*

[32] *Amicus Curiae* American Petroleum Institute argues that the reference to Section 301 standards means the pretreatment standards which are referred to in Sections 301(b)(1)(A)(ii) and 301(b)(2)(A)(ii). This explanation is implausible. If Congress meant pretreatment standards, it would have referred directly to Section 307, which governs both toxic pollutants and pretreatment standards. Moreover, it would be anomalous for Section 301(b) to apply to users of publicly owned treatment works, but not to existing point sources which discharge directly to navigable waters. See, 1 Leg. Hist. 263.

v. *Environmental Protection Agency, supra,* 526 F. 2d at 450, n. 17.

The terms "standards" and "limitations" are also used interchangeably in the legislative history.[33]

4. SECTION 304(b) DOES NOT REQUIRE THE ADMINISTRATOR TO ESTABLISH RANGES OF PERMISSIBLE POLLUTION FOR, OR SPECIFIC FACTORS TO BE CONSIDERED BY, THE ISSUERS OF PERMITS

Petitioners also make an elaborate argument that certain provisions of Section 304(b) are inconsistent with the establishment of specific numerical effluent limitations under Section 301, and therefore show that Congress did not authorize the Administrator to establish such limitations. They contend that Section 304(b) requires the Administrator to publish guidelines that (1) state only a numerical range for permissible effluent limitations, which sets the upper and lower limits that permits must specify, but leaves it to the issuer of the permit to select within that range the exact effluent limitations appropriate for the particular discharger; and (2) specify the factors upon which the permit issuer is to rely in setting effluent limitations in individual permits. Both the language of Section 304(b) and its legislative history refute these contentions.[34]

[33] See, *e.g.*, the Senate debate immediately preceding the vote to override the President's veto, where Senator Williams and Senator Percy referred to the need for uniform "effluent standards." 1 Leg. Hist. 132, 134.

[34] The court of appeals in this case and four other courts of appeals have rejected this contention. *American Frozen Food Institute* v. *Train, supra,* slip op. 63; *Hooker Chemicals & Plastics Corp.* v. *Train,* 537 F. 2d 620, 628–629 (C.A. 2); *American Meat Institute* v. *Environmental Protection Agency,* 526 F. 2d 442 (C.A. 7); *American Petroleum Institute* v. *Environmental Protection Agency,* C.A. 10, No. 74–1465, decided August 11, 1976. The only contrary decision, that of the Third Circuit in *American Iron & Steel Institute* v. *Environmental Protection Agency,* 526 F. 2d 1045, upon which petitioners heavily rely, is, for the reasons set forth in the text, erroneous.

a. *Section 304(b) does not require the Administrator to establish ranges of permissible polluting discharges within which the issuer of permits is to set separate effluent limitations, for particular dischargers.* Nothing in either Section 304(b) or Section 402 provides for the Administrator to establish a range within which levels of permissible pollution are to be determined, or suggests that the issuer of permits is given discretion to set effluent limitations for particular dischargers on the basis of the Administrator's guidelines. The statute nowhere uses the word "range" and, as the District of Columbia Circuit noted, "no such requirement was enacted in statutory form." *American Frozen Food Institute* v. *Train, supra,* slip op. 63.[35]

As noted (*supra,* pp. 7–8, 13, 44–45), both federal and state permits must insure compliance with all applicable requirements of the effluent limitations contained in Sections 301, 302, 306 and 307; there is no requirement, however, that such permits comply with the guidelines for effluent limitations established under Section 304(b). This omission of compliance

[35] See also *American Petroleum Institute* v. *Environmental Protection Agency, supra,* slip op. 18–22; *American Paper Institute* v. *Train,* C.A.D.C., No. 74–1480, decided August 6, 1976.

with the "guidelines for effluent limitations" is highlighted by the express requirement in Section 402(c)(1) that state permits must comply with the Administrator's "guidelines issued under section 304(h)(2)" for establishing uniform application forms, minimum reporting requirements for discharges, and minimum procedural requirements for monitoring and reporting.

No requirement to establish "ranges" to guide permit issuers can be implied from the direction to the Administrator in Section 304(b) to "identify in terms of amounts of constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources * * *." Measuring "the degree of effluent reduction attainable," in terms of amounts of constituents and characteristics of pollutants, implies the establishment of specific effluent limitations. The word "amounts" is in the plural form not to suggest a range of values, but to be consistent with the plural form of "constitutents," "pollutants," and "classes and categories".

The Senate Report on the Amendments twice refers to a "range" of discharge levels (S. Rep. No. 92–414, *supra,* at 50, 2 Leg. Hist. 1468):

> In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. * * *
>
> The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category.[36]

Insofar as Congress expected that there would be a "range" of permissible amounts of pollution "above a certain base level" within a category, its expectation has been satisfied. The Administrator has promulgated minimum effluent limitations for designated subcategories. "Ranges" of permissible pollution automatically result when an entire point source category (*e.g.*, "iron and steel manufacturing," "pulp and paper mills," or "inorganic chemicals manufacturing" (see Section 306(b)(1)(A)) is subdivided, and uniform levels are set to reflect the technological conditions within each subcategory.

While Congress desired the maximum degree of uniformity possible (see discussion, *infra,* pp. 59–67), it realized that broad industrial "classes and categories" are complex and diverse. Establishment of a single discharge level for pollutants in any given "category" of industry (*e.g.*, "iron and steel manufacturing") (see Section 306(b)(1)(A)) would be unworkable.

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[36] Senator Muskie repeated this statement during the Senate debate on the Conference Report. 1 Leg. Hist. 169–170.

For each category of industry, therefore, Congress expected a range of subcategories within which uniform standards could be practicably applied. Effluent limitations for each of these subcategories, determined on the basis of the best control technology in effect (Section 301(b)), thus provide a range covering an entire industrial category. As the Second Circuit recently noted in *Hooker Chemicals & Plastics Corp.* v. *Train, supra,* 537 F. 2d at 630:

> * * * Congress intended that the regulations establish a single discharge level for a given subcategory. This is implicit in the Congressional choice of the superlative form in the statutory language requiring achievement of the degree of effluent reduction attainable by application of *"best"* technology. * * * We * * * believe that whenever Congress spoke of "ranges" in the debates over the Act, it meant only the spectrum comprised of varying discharge levels on a subcategorical, rather than individual, basis. [Emphasis in original.]

Accord, *American Paper Institute* v. *Train, supra.*

Moreover, even within subcategories, specific effluent limitations constitute a minimum requirement. More stringent limitations may be imposed by the state or the Administrator in order to meet state water quality standards under Sections 301(b)(1)(C) and 303; and by the states under Section 510, 33 U.S.C. (Supp. V) 1370. Thus, as the court of appeals noted (A. 26), "the use of a single number limitation for discharge permits any discharge from 0 up to the allowed amount."

Indeed, if petitioners are correct that the Administrator's guidelines must include ranges within which the issuers of permits may set the maximum amounts of pollution for particular point sources, there would be little reason for the authority given the Administrator in Section 301(c) to modify the effluent limitations for 1983 under Section 301(b)(2)(A) in a permit for a particular point source. As we have shown (*supra,* pp. 37–38), the variance provision in Section 301(c) contemplates that the effluent limitations established under Section 301(b) will provide a uniform numerical limitation for all point sources within a particular industrial category or class. Moreover, formulating the guidelines in terms of a range of permissible pollution rather than an exact numerical limitation would be inconsistent with the congressional objective of eliminating all discharge of pollutants by 1985; with the Administrator's authority under Section 301(b)(2)(A) to prohibit any discharge of pollutants in the 1983 effluent limitations; and with his authority under Section 304(b)(3) to "identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources * * *."

b. *Section 304(b) does not require the Administrator to specify in the guidelines the factors that permit issuers are to consider in granting permits to individual dischargers.* Petitioners make a related contention based upon the language in Section 304(b)(1)(B) that the guidelines are to "specify factors to be taken into account in determining the control measures and

practices to be applicable to point sources" and to consider a list of "[f]actors relating to the assessment of the best practicable control technology available." They argue (Br. 73) that these requirements were intended "to assure that the wide range of differences in individual plants [be] taken into account by the permit authority." Under their theory, the permit issuers, instead of applying general effluent limitations framed in terms of industrial classes and categories, are to apply the factors plant by plant—a procedure that inevitably will result in wide variations in permissible discharge of pollutants among members of the same subcategory.

This argument, like the contention with respect to the specification of ranges of permissible pollution, just discussed, similarly undermines the basic congressional purpose of establishing uniform effluent limitations for industrial subcategories, which the individual permits must meet. Indeed, the requirement of specification of factors for permit issuers which petitioners would read into the Amendments would be unnecessary unless the Administrator's guidelines also are required to provide ranges of permissible pollution—which, as just shown, they are not required to do.

These requirements in Section 304(b) are not intended to provide guidelines for the issuance of permits, but to specify the factors the Administrator is to consider in establishing "guidelines for effluent limitations"—upon which limitations themselves to be established under Section 301(b) will be based. See *supra,* pp. 43–45. As we have noted before, it is the

effluent limitations and not the guidelines therefor that are to be applied in issuing the permits.

Section 304(b)'s requirement for regulations providing guidelines for effluent limitations is "[f]or the purpose of adopting or revising effluent limitations." For the 1977 step, the statute directs the Administrator to specify in the regulations "factors to be taken into acount in determining the control measures and practices to be applicable to point sources," and to assess the "best practicable control technology currently available to comply with subsection (b)(1) of Section 301 * * *." The Administrator is to take these factors into account in establishing the guidelines upon which the effluent limitations will be based, and not in issuing permits. The statutory directive with respect to factors instructs the Administrator how to prepare the guidelines and apply them in establishing the effluent limitations under Section 301(b); it does not purport to instruct him or the states with respect to the issuance of permits under Section 402(b). On the contrary, the very requirement that he "specify" indicates that he is to make a choice as to which factors he deems relevant to the determination he must make concerning "the control measures and practices to be applicable to point sources" (Section 304(b)(1)(B)).

In addition to requiring the Administrator to specify the factors he chooses to take into account, Section 304 lists factors that he must consider (Sections 304(b)(1)(B) and (b)(2)(B)). For the 1977 step, these are "the total cost of application of technology

in relation to the effluent reduction benefits to be achieved from such application * * * the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, [and] nonwater quality environmental impact (including energy requirements) * * *."

In promulgating the effluent limitation guidelines for the inorganic chemicals manufacturing industry, the Administrator complied with these requirements by specifying and analyzing all the relevant factors, including those specifically mandated by the statute. The development document for this industry contains hundreds of pages analyzing the factors. See, *e.g.*, A. Exh. Vol. 5427–5569, 5593–5643, 5771–5809, 5810–5893. The factors were further "specified" by defining subcategories and subdivisions within the industry which reflect them.[37] These subcategories reflect, *inter alia*, the production process, type of operation, type of equipment, final product, scale of production, age of the source, and other technological considerations (A. 67–82). The Administrator also took into account various economic factors affecting the industry (A. 79–80; App. Br. 18b). Each section of the regulations notes (*e.g.*, App. Br. 31b, 37b, 40b, 40 C.F.R. 415.62, 415.72, 415.82):

> In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established.[38]

The Administrator provided by regulation for individualized treatment of particular existing point sources by authorizing the issuer of a permit to grant, subject to his approval, limited variances from the 1977 effluent limitations upon finding that the factors applicable to the particular discharger are fundamentally different from those upon which the general effluent limitations are based.[39] The statute itself pro-

[37] The effluent limitation for each production subcategory among the 22 constituting the Inorganic Chemicals Manufacturing Point Source Category is defined in a separate section of Part 415, 40 C.F.R.

[38] See generally the Development Document (A. Exh. Vol. 5644–5646, 5593–5643, 5645, 5771–5809, 5810–5893) and the Economic Analysis (A. Exh. Vol. 5419A–5569). These lengthy and detailed documents explain how the effluent limitations were derived and the consideration given to each factor listed in Section 304(b).

[39] *E.g.*, App. Br. 31b, 37b, 40b; 40 C.F.R. 415.62; 415.72; 415.82. The variance clause recites that despite consideration of relevant technological and economic factors affecting subcategorization and effluent levels, relevant data may not "have been available and, as a result, these limitations should be adjusted for certain plants in this industry" (App. Br. 32b). A discharger may submit evidence to the state or federal permit issuer that "factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines" (*ibid.*). Limitations which are more or less stringent than the regulations then may be established for that discharger by the permit issuer, upon finding that such fundamental differences exist, and upon approval by the Administrator. See also App. Br. 17b–18b.

Whether a discharger is "fundamentally different" is determined by reference to the Development Document which accompanies each set of regulations. In conformance with clear congressional intent one factor, however, cannot be considered for purposes of 1977 level variance application: the economic situation of the dis-

vides in Section 301(c) for variances from the 1983 limitations and not through the specification of factors.

Thus, Section 304 does not contemplate that the Administrator is simply to specify factors that may be taken into account and converted into effluent limitations only through the issuance of individual permits. The legislative history confirms this. The Conference Report emphasized that under Section 304 (b)(1)(B), which requires the Administrator to consider the cost of technology in relation to the benefits of the effluent reductions involved, the analysis cannot be made on a plant-by-plant basis. It may be made only in relation to categories and subcategories of particular industries. 1 Leg. Hist. 304. As Senator Muskie stated in his written explanation of this aspect of the Report (1 Leg. Hist. 170):

> The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community.[40]

charger. See 39 Fed. Reg. 30073 and discussion *infra*, p. 58.

Such variance provisions were upheld in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 537 F. 2d 642 (C.A. 2).

[40] In a recent decision (*Appalachian Power Co.* v. *Train*, No. 74–2096, *et al.*, decided July 16, 1976), the Fourth Circuit indicated a contrary view. Explaining the court's holding in this case

As the Second Circuit correctly held in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 537 F. 2d 642, 645–646, nothing in the Act requires that effluent limitations, by variance or otherwise, must encompass wholesale reconsideration at the permit granting stage of all the factors that were assertedly considered initially by the EPA in formulating the regulation. Such wholesale reconsideration was never the intent of Congress.

B. THE LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS CONFIRMS THAT THE ADMINISTRATOR HAS AUTHORITY TO ESTABLISH EFFLUENT LIMITATIONS UNDER SECTION 301(b) FOR CLASSES AND CATEGORIES OF POINT SOURCES

Any doubt still remaining about the Administrator's authority under Section 301 to establish effluent limitations for classes and categories of point source pollution is dispelled by the legislative history of the 1972

(A. 253) that the Administrator's effluent limitations are "presumptively applicable to permit applications," *Appalachian Power* further states (slip op. 15): "Thus, the issuer of a permit, under § 402 may consider whether a particular applicant is to be held strictly to the confines of the agency's regulations. The burden of proof remains upon the applicant, however. Only after he has established the inappropriateness of the regulations as applied to him, for example, employing the generic factors of §§ 304, 306 *or* any specific variance clauses promulgated thereunder, need the permit issuer go beyond the regulations" (emphasis added). Insofar as the foregoing language invites reconsideration by the permit issuer of factors already considered by the Administrator in establishing effluent limitations under Section 301 for existing sources, and under Section 306 for new sources, the Fourth Circuit's analysis is inconsistent with the statute. The correct view is stated by the Second Circuit in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, *supra*.

Amendments. That history shows that Congress intended the Administrator to set effluent limitations under Section 301(b) on the basis of industrial subcategories, not on a plant-by-plant basis, and that it intended the effluent limitations to be uniform within each subcategory—a uniformity that could not be achieved if effluent limitations could be established only in permits.

There were differences in the bills passed by the House and the Senate,[41] which were resolved in conference (1 Leg. Hist. 161–279). S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. (1972) (1 Leg Hist. 281–339). The bill was passed over the President's veto [42] (1 Leg. Hist. 95–136).

The Conference Report stated with respect to the effluent limitations to be achieved under Section 301 (1 Leg. Hist. 304):

> The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.[43]

[41] See H.R. 11896, 92d Cong., 2d Sess. (1972) (1 Leg. Hist. 893–1110); and H.R. Rep. No. 92–911, 92d Cong., 2d Sess. (1972) (1 Leg. Hist. 753–888); S. Rep. No. 92–414, *supra* (2 Leg. Hist. 1415–1533).

[42] The President objected on budgetary grounds (1 Leg. Hist. 137).

[43] The Conference Report also contemplated that the Administrator could waive applicable 1983 effluent limitations for particular existing point sources (1 Leg. Hist. 304): "However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable. The burden will be on him to show that modified requirements will represent the maximum use of technology within his economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants. If he makes this showing, the Administrator may modify the requirements applicable to him."

In discussing the closely related provisions of Section 304(b), governing regulations providing guidelines for effluent limitations, the report said (1 Leg. Hist. 309):

> Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

Senator Muskie, on presenting the Conference Report to the Senate, reiterated this purpose to require each point source within a category or class to meet nationally uniform effluent limitations (1 Leg. Hist. 162–163):

> Senators will recall from the November debate on the Senate bill that there were three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them.

As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on "best practicable" technology no later than July 1, 1977. This does not mean that the Administrator cannot require compliance by an earlier date; it means that these limitations must be achieved no later than July 1, 1977, that they must be uniform, and that they will be final upon the issuance of a permit under section 402 of the bill.

* * * * *

The third critical element that concerned the Senate in its consideration of this legislation was enforceability. Enforceability is assured through the provisions of the permit program and through section 309, the enforcement section of the act. The Administrator has the responsibility to determine the effluent limitations to be applied to each category or class of polluter, to set forth those limitations in a permit issued pursuant to section 402 of the act, and to enforce those limitations through the provisions of section 309.

The congressional intent shown in the Conference Report that uniform effluent limitations would be established also was reflected in the House and Senate treatment of the bill. In its general synopsis of the bill, the House Report characterized the relationship between Sections 301 and 402 as follows (1 Leg. Hist. 761):

> [The bill] [d]eclares to be unlawful the discharge of any pollutant by any person except as specifically authorized in the bill. The bill establishes a Federal-State discharge permit program. All permits issued under this program shall be consistent with the specific requirements of the bill, including effluent limitations or other limitations, national standards of performance, toxic and pretreatment standards, and ocean discharge guidelines.

In explaining the provision of Section 402 requiring permits to ensure compliance with "all the applicable requirements of sections 301, 302, 306, 307, 308, 316 and 403 * * *", the Report stated (1 Leg. Hist. 812–813):

> The Committee points out * * * that the term "applicable" used in section 402 has two meanings. It means that the requirement which the term "applicable" refers to must be pertinent and apply to the activity and the *requirement must be in existence by having been promulgated or implemented.*
>
> *The Committee further recognizes that the requirements under sections 301,* 302, 306, 307, 308, 316 and 403 *will not all be promulgated immediately upon enactment of this bill.* Nevertheless, it would be unreasonable to delay issuing of permits until all the implementing steps are necessary. Therefore, subsection (a)(2) provides that prior to the taking of the necessary implementing actions relating to all such requirements, the Administrator may issue permits during this interim period with such conditions as he determines are necessary to carry out the provisions of this Act. [Emphasis added.]

Similarly, in discussing the provision that compliance with a permit would be deemed compliance with various statutory requirements, the Report again reflected the expectation that effluent limitations would be promulgated under Section 301 (1 Leg. Hist. 815):

> Subsection (*l*) [now (k)] [of section 402] provides that compliance with a permit issued pursuant to section 402 shall be considered to be compliance for purposes of sections 309 and 505, with section 301, 302, 306, 307, 316 and 403 * * *. The purpose of this provision is to assure that the mere *promulgation of any effluent limitation or other limitation,* a standard, or a thermal discharge regulation, *by itself will not subject a person holding a valid permit to prosecution.* However, once such a requirement is actually made a condition of the permit, then the permittee will be held to comply with the terms thereof. [Emphasis added.]

The Senate Committee Report reflected the same view. In discussing the two-step program in Section 301(b) "for applying effluent limits," the first based on the best practicable technology "to be implemented by 1976" and the second based on the best available technology, with a goal of no discharge "to be implemented by 1981" (S. Rep. No. 92–414, *supra,* at 8, 2 Leg. Hist. 1426), the Report stated (2 Leg. Hist. 1468):

> It is the Committee's intention that *pursuant to subsection 301(b)(1)(A), and Section 304(b) the Administrator* will interpret the term "best practicable" when applied to various categories of industries as a basis for *specifying* clear and precise effluent *limitations* to be implemented by January 1, 1976. [Emphasis added.]

Senator Bentsen, a member of the Senate Public Works Committee which drafted the bill, made clear that the Administrator was to establish Section 301 limitations (2 Leg. Hist. 1283):

> In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1976 [now July 1, 1977], which comply with specifically defined levels of effluent control and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in *the regulations which we anticipate the Administrator shall issue pursuant to section 301 and section 304,* these 1976 [now 1977] goals shall be at least * * * the "best practicable control technology currently available" for other [industrial] point sources * * *. [Emphasis added.]

When the President considered the bill, Mr. Ruckelshaus, who was the first Administrator of the Environmental Protection Agency, advised the President that "the Administration proposed that 'standards be amended to impose precise effluent requirements on all industrial sources.' The enrolled bill has done so" (1 Leg. Hist. 156).

The legislative history thus shows that Congress intended to remedy the inadequacies of previous pollution control by having the Administrator promulgate uniform national effluent standards under Section 301 (b), on the basis of subcategories of industry, and not by applying generalized guidelines to individual polluters through permits. The permit program was intended to be the method for implementing and enforc-

ing the effluent limitations already established under Section 301(b), not for establishing those limitations."

Congress wisely adopted this procedure for achieving uniform national effluent standards. If effluent limitations could be imposed only through the permit program, it would be virtually impossible to produce the national uniformity in controlling pollution that Congress sought to achieve. Wide variations in permissible limits of pollution within a single subcategory of industry would result.

In the absence of uniform, binding effluent limitations, the permit issuing official would essentially start over again, engaging in largely redundant reconsideration of all the factors and information the Administrator considered in establishing the regulations. Not only would the final permits reflect the varying views of the 27 States with approved permit programs, but each such State would be forced to hold lengthy adjudicatory procedures to consider anew the effluent limitations which the Amendments require. Since each point source must achieve the best practicable control technology currently available by July 1, 1977, and the best available technology economically achievable by

" Petitioners challenge the authority of the foregoing legislative history, relying primarily on an article by the former General Counsel of the Environmental Protection Agency suggesting that the legislative history contains so many conflicting statements as to render it unreliable (Br. 61–63). This Court, however, has always recognized the relevance and importance of the statements in Committee Reports and by the principal sponsors of, and spokesmen for, the legislation in determining its meaning. See, *e.g.*, *Train* v. *Colorado Public Interest Research Group*, No. 74–1270, decided June 1, 1976.

July 1, 1983, Congress did not intend the Administrator and the State permit issuers to consider anew in licensing proceedings the same factors that the Administrator had already considered in promulgating the guidelines under Section 304(b) and twice to make the necessarily complex and difficult analyses required.

Under petitioners' approach, the nationally uniform control of pollution that Congress intended to accomplish in the 1972 Amendments would be frustrated. Moreover, the delays resulting from petitioners' interpretation would thwart, if not render impossible, the attainment of the deadlines which Congress established.

C. ESTABLISHMENT BY THE ADMINISTRATOR OF GENERALLY APPLICABLE EFFLUENT LIMITATIONS WOULD NOT CURTAIL OR WEAKEN THE ROLE CONGRESS INTENDED THE STATES TO HAVE IN THE ADMINISTRATION OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS

Petitioners contend that establishment of generally applicable effluent limitations by the Administrator is inconsistent with the congressional policy reflected in the Amendments to preserve the rights and responsibilities of the states in controlling pollution, planning land use, and regulating their water resources. Section 101(b), 33 U.S.C. (Supp. V) 1251(b). They assert that state permit-issuing authorities will be reduced to "mere scriveners" (Pet. Br. 58), if they are bound by nationally uniform minimum effluent limitations.

The Amendments, however, contain elaborate and complex provisions for the participation of the states in the processes of formulating effluent limitations and of issuing permits. These provisions are consistent with, and indeed contemplate, the establishment of basic effluent limitations by the Administrator.

Section 303 of the Amendments, 33 U.S.C. (Supp. V) 1313, requires the states to develop water quality standards for all their waters, and then to survey those waters to ascertain whether the Administrator's effluent limitations under Section 301(b) for the period beginning in 1977 are sufficiently stringent to ensure the attainment and maintenance of such quality. Section 303(d)(1)(A), 33 U.S.C. (Supp. V) 1313(d)(1)(A). If they are not, the state must establish for the particular waters involved a total maximum daily load of pollutants, which the discharges permitted under federal or state permits cannot exceed. Section 303(d)(1)(C), 33 U.S.C. (Supp. V) 1313 (d)(1)(C).

When a permit for a specific point source is under consideration, the Administrator's effluent limitations under Section 301(b) will govern the permit only if those limitations will meet the state water quality standards.[45] If not, the permit must impose "more stringent" limitations. Section 301(b)(1)(C), 33 U.S.C. (Supp. V) 1311(b)(1)(C). Thus, more stringent limitations based on state requirements may frequently supersede the federal limitations.

[45] See 1 Leg. Hist. 209 (statement of Senator Tunney), 238, 353, 488, 724 (statements of Representatives Jones, Blatnik, Wright and Robison).

Under Section 304(a) and (b), the Administrator is required to consult with the states on water quality criteria and effluent guidelines. Under Section 309(a)(1), the Administrator may refer violations of a state-issued permit to the state before he seeks to remedy the violation. Although the Administrator has the initial responsibility to issue NPDES permits under Section 402(a), the states may assume this function under a state permit program, approved by the Administrator, which meets the standards specified in Section 402(b), including compliance with the effluent limitation provisions of the Amendments in Sections 301 (existing sources), 306 (new sources), 307 (toxic discharges), 308 (inspection, monitoring and reports) and 403 (ocean discharge criteria). Section 402(b). Conversely, the Administrator cannot issue a permit unless the state in which the permit applicant is located certifies, or refuses or fails to certify, that the permit will assure compliance with applicable provisions of Sections 301, 302, 306 and 307, state water quality requirements and any other appropriate requirement of state law, or certifies that there is no limitation or standard applicable under these provisions.[46] Section 401(a)(1), 33 U.S.C. (Supp. V) 1341(a)(1).

The 27 states operating approved programs ("NPDES states") (see p. 36, *supra*) perform the

[46] Under Section 208, states also have primary responsibility for controlling "non-point sources" of pollution (*e.g.*, run-off from open lots). Section 208(b)(2), 33 U.S.C. (Supp. V) 1288(b)(2).

same functions as the Regional Administrators of the Environmental Protection Agency, to whom the Administrator has delegated his permit-issuing authority in the remaining states. 40 C.F.R. 125.4. These 27 states have important functions in applying the Administrator's effluent limitations in the permits they issue to individual dischargers. They must "provide an opportunity for public hearing before ruling on each application." Section 402(b)(3). They must determine the subcategory in which the point source falls—a task which may involve sophisticated technological analysis, particularly when multi-process plants are involved.[47] They must also determine such variables as production rate or wastewater flow rate, in order to translate limitations expressed, for example, in pounds of pollutant per ton of production into an exact number.[48]

A particularly important state function involves application of the variance clause established by the regulations for the 1977 level of effluent limitations under Section 301 (see discussion *supra,* p. 57, n. 39). The state NPDES authority must determine whether for a particular point source there exists a "fundamentally different factor" and, if so, ascertain the ex-

[47] Quite frequently, the permit issuer will find that, while a point source is generally subject to an EPA effluent limitation, some portion of its discharge is not. The permit will, therefore, in part reflect an *ad hoc* determination of the appropriate limitations. In the case of complex sources, two or more effluent limitations may apply and determination of the permit limitations will require a weighted application of the limitations.

[48] The regulations challenged in this case are in this form. See, *e.g.*, 40 C.F.R. 415.62, 415.92, 415.152; App. Br. 33b, 46b, 54b.

tent to which the effluent limitations should be adjusted accordingly (*ibid*).[49]

The NPDES state is also responsible for determining a very important type of "effluent limitation"—the schedule of compliance.[50] A compliance schedule is a "schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." Section 502(17), 33 U.S.C. (Supp. V) 1362(17). The authority to set compliance schedules is critical, since the timing by which a source achieves compliance with the Administrator's effluent limitations will have important fiscal and social implications. In establishing a compliance schedule, NPDES states have the exclusive power to set interim effluent limitations which existing sources must achieve prior to the effective dates of the federal effluent limitations for 1977 and 1983. Sections 402(b)(1) and 502(17), 33 U.S.C. (Supp. V) 1342(b)(1) and 1362(17).[51]

Finally, the state permit-issuing authority also is responsible for establishing specific monitoring and

[49] On this basis alone, the District of Columbia Circuit rejected the argument that state permit granting would be a "clerical rubber stamping exercise." *American Paper Institute* v. *Train*, No. 74–1480, decided August 6, 1976, slip op. 15–16.

[50] Section 502(11), 33 U.S.C. (Supp. V) 1362(11), includes "schedules of compliance" in the definition of effluent limitations.

[51] Although Congress anticipated that establishment of effluent limitations would precede issuance of most NPDES permits, because of the short deadlines in the Amendments, federal and state permit-issuers need not delay permits until those limitations have been promulgated. See 1 Leg. Hist. 813.

reporting requirements, without which enforcement of the permit would be impossible (Section 402(b)(2)(B)).

The many ways in which states establish permit conditions, including schedules of compliance and water quality-based effluent limitations, account for the references in the Amendments and its legislative history to the "establishment" of "limitations" by states. But this power is supplementary to, not exclusive of, the Administrator's primary responsibility under Sections 301, 304, 306 and 307 to establish uniform national technology-based limitations for point sources of pollution. Section 510 declares that except as expressly provided, nothing in the Amendments shall preclude a state or political subdivision from adopting or enforcing "any standard or limitation respecting discharges of pollutants * * *." It further provides, however, that "if an effluent limitation * * * is in effect under this Act," the state and its subdivisions "may not adopt or enforce any effluent limitation * * * which is less stringent * * *." As noted above (see discussion *supra,* p. 40), this provision contemplates that minimum effluent limitations will be established by someone other than the state, *i.e.,* by the Administrator.[52]

[52] Petitioners argue (Br. 82–83) that if the Administrator has authority to establish uniform effluent limitations that bind the states in issuing permits, there would be no need for the Administrator's authority under Section 402(d) to veto the issuance of any particular state permit. That authority, however, serves the important function of enabling the Administrator to bar any state permit that does not comply with the effluent limitations he has established under Section 301(b). Although hopefully all state authorities will comply with those limitations in issuing permits, cases may arise where they fail to do so, and the Administrator then can use his veto power to insure state compliance with the effluent limitations in the particular case.

II

THE ADMINISTRATOR EMPLOYED AN APPROPRIATE PROCEDURE IN COMBINING THE PROMULGATION OF GUIDELINES UNDER SECTION 304 AND THE ESTABLISHMENT OF EFFLUENT LIMITATIONS UNDER SECTION 301 INTO A SINGLE PROCEEDING

Section 304(b) requires the Administrator to publish guidelines for effluent limitations within one year of the enactment of the statute, *i.e.,* by October 18, 1973. Section 301 requires the achievement of effluent limitations for existing point sources, based on the best practicable technology currently available, by July 1, 1977. These requirements, which apply to the whole of American industry, posed an enormous task, which the Administrator was required to accomplish within a short time.

As the record in this case shows, the kind of in-depth analysis of the sources of pollution and the best available technology for controlling it which the Amendments intended required massive study. Although the Amendments seemingly contemplate that the Administrator first would promulgate the guidelines and then convert them to effluent limitations, the short period within which he had to complete both of these actions made it impracticable to do so. Instead, he followed the preeminently practical procedure in

dealing with all industries of combining both steps into a single proceeding at the end of which he made a single determination embodying the guidelines and the effluent limitations.

The Administrator's decision to follow this procedure was a reasonable one in the circumstances. It reflects his expert judgment as to the most effective procedures for making this novel, complicated and complex statute operative in a short time. His determination was an integral part of setting the statute's "machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," and his view that the statute authorizes this procedure is therefore entitled to substantial weight. *Udall* v. *Tallman,* 380 U.S. 1, 16.

It is hardly surprising, therefore, that the four courts of appeals that have considered this question have upheld the Administrator's action in combining into a single proceeding the establishment of the guidelines under Section 304 and the effluent limitations under Section 301. *American Frozen Food Institute* v. *Train,* C.A.D.C., No. 74–1464, *et al.,* decided May 11, 1976, slip op. 38–41; *Hooker Chemical & Plastics Corp.* v. *Train,* 537 F. 2d 620, 628–629 (C.A. 2); *American Petroleum Institute* v. *Environmental Protection Agency,* C.A. 10, No. 74–1465, *et al.,* decided August 11, 1976, slip op. 14–15, and the decision in this case (A. 260).

Petitioners can point to no prejudice they suffered

from the procedures the Administrator followed. In August 1973 the Administrator published a preliminary notice with respect to the promulgation of guidelines and effluent limitations, in which he explained the procedures and methodology he proposed to follow (*supra,* p. 16). In October 1973, he published a notice of proposed rulemaking which included specific numerical effluent limitations for each of the 22 subcategories of the inorganic chemicals manufacturing industry (*supra,* p. 16). The notice gave all interested parties the opportunity to comment on the rules and petitioners did so. The actual effluent limitations were promulgated in March 1974 (*supra,* p. 19).

Petitioners thus had full opportunity to be heard with respect to both the guidelines and the effluent limitations before the Administrator promulgated them. They would have been no better off in making their objections to the guidelines and limitations known to the Administrator if he had dealt with these subjects in two separate proceedings, and not established the effluent limitations until after the guidelines had been promulgated. The latter procedure, however, as we have indicated, would have seriously interfered with the Administrator's ability to get under way the pollution control program directed by Congress within the time limits Congress had set.

This Court last Term upheld a similar combination into a single proceeding of administrative determina-

tions which the statute seemingly contemplated would be made in separate steps. Section 7(b) of the Natural Gas Act, 52 Stat. 821, prohibits a natural-gas company from abandoning any facility without a determination by the Federal Power Commission that the public convenience and necessity permits the abandonment. In *Federal Power Commission* v. *Moss*, 424 U.S. 494, the Court upheld a Commission order which "upon a proper finding of public convenience or necessity, simultaneously authorize[d] both the sale of natural gas in interstate commerce by a producer and the abandonment of the sale at a future date certain" (*id.* at 496). The Court reasoned that "[i]n the absence of an explicit direction [in the Natural Gas Act] the inference may reasonably be made that Congress left the timing of the finding within the general discretionary power granted the FPC 'to regulate abandonment of service' * * * '[T]he Commission's broad responsibilities . . . demand a generous construction of its statutory authority' * * * and that inference is plainly consistent with Congress' regulatory goals." 424 U.S. at 500. This reasoning is equally applicable to the Administrator's combining Sections 301 and 304(b) determinations into a single proceeding.

Petitioners argue (Br. 31–36), however, that the Administrator did not comply with Section 304(b) because he did not issue formal "regulations" providing "guidelines for effluent limitations," as that section requires him to do. Although the Development Documents containing the technological data were not formally designated as "regulations," they, together

with the preamble to the formal regulations in issue and the regulations themselves which specify "the degree of effluent reduction" to be achieved (Section 304(b)(1)(A) and (b)(2)(A), in practical effect met the requirements of Section 304(b). As detailed in the statement *supra*, pp. 10–11, 13–21), the procedures the Administrator followed in promulgating the guidelines were no different from those he would have followed had he promulgated them as formal "regulations." The Administrator's actions in this case fully complied with the procedures and standards that Congress contemplated and intended for the establishment of guidelines and effluent limitations, and they are not invalid merely because he failed to attach the label "regulations" to all documents which constitute the guidelines.[53]

III

THE COURTS OF APPEALS HAVE EXCLUSIVE JURISDICTION TO REVIEW EFFLUENT LIMITATIONS PROMULGATED BY THE ADMINISTRATOR UNDER SECTION 301 OF THE AMENDMENTS, WHICH INCLUDES JURISDICTION TO REVIEW THE GUIDELINES UNDER SECTION 304, WHICH WERE PROMULGATED IN THE SAME PROCEEDING AS THE EFFLUENT LIMITATIONS

Section 509(b)(1) of the Amendments, 33 U.S.C. (Supp. V) 1369(b)(1), provides in pertinent part:

> Review of the Administrator's action * * * (E) in approving or promulgating any effluent limitation or other limitation under section 301

[53] As petitioners recognize, the effluent limitations were established by regulations. App. Br. 1b; see *id.* at 2b, 20b.

> * * * may be had by any interested person in the Circuit Court of Appeals * * *.

The foregoing provision in terms covers the Administrator's promulgation of effluent limitations under Section 301. Under well-settled principles, this jurisdiction of the court of appeals is exclusive. Cf. *Whitney Bank* v. *Bank of New Orleans,* 379 U.S. 411, 420–422; *Fort Worth Nat. Corp.* v. *Federal Savings & Loan Ins. Corp.,* 469 F. 2d 47, 52 (C.A. 5); H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950).

As this Court stated in *Whitney Bank, supra,* 379 U.S. at 420:

> [W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. * * * To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.

Petitioners argue (Br. 87), however, that since the Administrator has no authority to establish effluent limitations under Section 301, the courts of appeals have no jurisdiction to review them. We have answered the premise of that argument in points I and II above; since, as we have shown, the Administrator has that power, his exercise of it is reviewable in the courts of appeals. Moreover, the jurisdiction of the courts of appeals to review the Administrator's effluent limitations necessarily includes the threshold determination whether he has the power to establish

them. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415. Indeed, petitioners apparently recognize (Br. 85) that, if the Administrator has that authority, its exercise is reviewable in the courts of appeals and not in the district courts.

Petitioners' main contention on the jurisdictional question relates to review of the Administrator's guidelines for effluent limitations promulgated under Section 304(b). They argue that even if the Administrator has authority to promulgate effluent limitations under Section 301 (which are reviewable in the courts of appeals), the guidelines upon which those limitations are based are reviewable only in the district courts. Their argument produces the anomalous result that even though the Administrator promulgated the guidelines and limitations almost simultaneously in a single proceeding, and even though the two are inextricably intertwined since the effluent limitations are determined by applying the guidelines to particular industrial subcategories, the two sets of actions nevertheless are to be reviewed in different courts.

The Administrator formulated the guidelines and the effluent limitations in a single proceeding and promulgated both of them simultaneously as component parts of a single determination. The guidelines contained the technological information upon which the effluent limitations were based and which they incorporated; they were an integral part and an essential element of the effluent limitations. They were basi-

cally a preliminary but indispensable step in the Administrator's ultimate establishment of the effluent limitations.

In these circumstances, the guidelines are reviewable together with the effluent limitations only in the courts of appeals, and not in the district courts. This conclusion follows from the language of the statute and the seriously adverse consequences upon its proper administration that would result from the bifurcated review that petitioners propose.

Section 509(b)(1) provides for review of "the Administrator's action * * * in promulgating any effluent limitation." As the court of appeals held (A. 250), one of the Administrator's actions in establishing the effluent limitations for the inorganic chemicals manufacturing industry was the issuance of the guidelines upon which those limitations were based. Those guidelines, it reasoned, are "the key to the attainment of the objectives set forth in § 301" (*ibid.*). They are therefore exclusively reviewable in the courts of appeals under Section 509(b)(1).

The divided review that petitioners espouse would thwart the congressional intent that reduction and then elimination of pollution of the Nation's waters be accomplished as soon as possible. The first and basic step in meeting this objective is, as we have explained above, the establishment on a national uniform basis of (1) guidelines under Section 304 for effluent limitations and (2) specific numerical effluent limitations based upon those guidelines. The limitations, in turn, would be the basis for the specific re-

ductions (specified in permits) that individual polluters are required to make in their effluent discharges by 1977 and 1983. If the national standards are to accomplish their purpose, they must be final and effective as soon as possible. See *Natural Resources Defense Council, Inc.* v. *Train*, 510 F. 2d 692, 704–705 (C.A.D.C.).

Congress sought to accomplish the latter objective by requiring in Section 509(b)(1) that any petition to review the Administrator's action in approving or promulgating any effluent limitation must be filed within 90 days, unless based solely on grounds occurring after the ninetieth day.[54] The Amendments further provide that actions of the Administrator so reviewable are not reviewable in any civil or criminal enforcement proceeding (Section 509(b)(2)). As the Senate Committee Report on the bill explained: "In order to maintain the integrity of the time sequences provided throughout the Act, * * * any review sought must be filed within 30 [now 90] days of the date of the challenged promulation * * *" (2 Leg. Hist. 1503). See also, *American Meat Institute* v. *Environmental Protection Agency, supra*, 526 F.2d at 452.[55]

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[54] This 90-day limitation covers not only effluent limitations for existing sources of pollution established under Section 301, but also those for new sources established under Section 306, for toxic pollutants and for users of municipally owned treatment works established under Section 307, and for permits incorporating those limitations issued under Section 402.

[55] In this proceeding the Administrator promulgated guidelines for effluent limitations to be achieved by both 1977 and 1983. Petitioners argue (Br. 80–82) that Congress did not intend

Petitioners' proposal for bifurcated review would upset the carefully drawn system of judicial review that Congress provided in order to insure prompt determination of the validity of the Administrator's actions in setting national standards for effluent limitations. Unlike the 90-day limit upon court of appeals' review, there is no time limit for suits in the district courts. Permitting review of the guidelines initially in the district courts, followed by court of appeals' review of those decisions, would delay the effectiveness of the national standards. Furthermore, uniform standards could be achieved more effectively and more expeditiously by direct review in the 11 courts of appeals than by initial review in the 94 district courts. Petitioners' theory would produce the anomalous situation that, although the effluent limitations and the permits applying them would be reviewed in the courts of appeals, the underlying guidelines upon which those limitations rest would be reviewed initially in the district courts. As the court of appeals pointed out in this

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the latter guidelines to be reviewed at this time, and that the 90-day limitation on court of appeals' review thus shows that those courts were not to review the guidelines.

There is nothing in the language of the Act, its design or its legislative history that indicates that Congress intended to defer review of the guidelines for 1983 to some future date. To the contrary, since the Administrator promulgated the guidelines for both periods simultaneously, any review of them also should be had simultaneously. Moreover, the arguments against permitting the delay in implementing the Administrator's limitations on effluent discharges that petitioners' bifurcated review would create are equally applicable to the 1983 standards as to those for 1977. Indeed, in selecting the methods by which they will achieve the latter restrictions, dischargers also will have to consider the former.

case (A. 249), under petitioners' theory an operator of a single plant would be required to institute two separate but concurrent actions—one in the district court and one in the court of appeals—to challenge the Administrator's simultaneous actions under Sections 301, 304 and 306 affecting the plant (A. 250). Congress did not intend the judicial review provisions of the 1972 Amendments to produce such delaying and cumbersome results. [56]

In view of these considerations, it is not surprising that all but one of the seven circuits that have reviewed challenges to the Administrator's guidelines and effluent limitations have held that they have jurisdiction to review those regulations.[57] Indeed, in every case in which the district court dismissed a suit challenging those regulations for lack of jurisdiction, the plaintiff

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[56] The Administrative Conference of the United States has recommended direct review in the courts of appeals of agency rules "whenever (i) an initial district court decision respecting the validity of a rule will ordinarily be appealed or (ii) the public interest requires prompt, authoritative determination of the validity of the rule." Administrative Conference of the United States, Recommendation No. 75–3 (adopted June 5–6, 1975) 1974–75 Report, Administrative Conference of the United States, March 1976, pp. 42–46. Both conditions apply here. See also Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Col. L. Rev. 1 (1975); Jaffe, *Judicial Control of Administrative Action* 158–159 (1965); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 984–985 (1975).

[57] In addition to the instant case, see *American Frozen Food Institute* v. *Train*, C.A. D.C., Nos. 74–1464, *et al.*, decided May 11, 1976; *Hooker Chemicals & Plastics Corp.* v. *Train*, 537 F. 2d 620 (C.A. 2) *American Iron & Steel Institute* v. *Environmen-*

also had filed a petition to review in the court of appeals, [58] as petitioners did here.[59]

tal Protection Agency, 526 F. 2d 1027 (C.A. 3); *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442 (C.A. 7); *American Petroleum Institute* v. *Train*, 526 F. 2d 1343 (C.A. 10). *Contra: CPC International Inc.* v. *Train*, 515 F. 2d 1032 (C.A. 8).

[58] In addition to the present case see: *American Paper Institute* v. *Train*, 381 F. Supp. 553 (D.D.C.) (pulp and paper regulations), petition for review, C.A. D.C., Nos. 74–1480, *et al.*, decided August 6, 1976; *American Petroleum Institute* v. *Train*, 7 E.R.C. 1795 (D. Colo.) (petroleum refining regulations), petition for review decided August 11, 1976, C.A. 10, No. 74–1465; *The Anaconda Co.* v. *Environmental Protection Agency*, D. Mont., No. CV 75–69–BU (unreported) (appeal pending, C.A. 9, No. 76–1603) (nonferrous metals regulations), petition for review, C.A. 9, No. 75–2170, transferred, C.A. 10, No. 75–1605; *Homestake Mining Co.* v. *Train*, D. S.D., No. CIV 76–5011 (ore mining and dressing regulations), petition for review, C.A. 10, Nos. 76–1287, 76–1242; *Shell Oil Co.* v. *Train*, 415 F. Supp. 70 (W.D. Cal.) (petroleum refining regulations), appeal pending, C.A. 9, No. 76–1870, petition for review dismissed, C.A. 9, No. 75–2070 because regulations under review in Tenth Circuit.

Seven district court actions remain pending. In four of them, petitions for review are also pending in the courts of appeals. *Laupahoehoe Sugar Co.* v. *Train*, D. Hawaii, No. 75–0159, petition for review of the sugar processing regulations pending in the Ninth Circuit, No. 75–2252; *Sierra Club* v. *Train*, D. D.C., No. 76–1026, petition for review of the iron and steel Phase II regulations pending in the Third Circuit, No. 76–1749; *International Paper Co.* v. *Train*, E.D. Ark., No. BP–76–C–212, petitions for review pending, C.A. D.C., Nos. 76–1689, 76–1676. The remaining four all arose in the Eighth Circuit. Two of them involve, in part, challenges to a regulation which the Seventh Circuit sustained in *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442; *American Association of Meat Processors* v. *Train*, D. Neb., No. 75–0–394; and *N.I.M.P.A.* v. *Train*, D. Neb., No. 75–0–369. One of the two remaining actions is pending in the district court and the other is on appeal to the Eighth Circuit. *National Renderers Ass'n* v. *Train*, D. Neb., No. 75–0–

([59] Footnote 59 is on p. 85 of this brief.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed, in part, except in the

482), *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96 (S.D. Iowa), appeal pending, C.A. 8, No. 76–1233.

Although a decision by this Court that the district courts have no jurisdiction to entertain those suits would deny the plaintiffs in those four cases judicial review of their claims, that does not mean that they have no chance of obtaining redress if the regulations should prove to be unduly harsh in operation. They may request the agency to modify its regulations, and if it declines to do so, may seek timely court of appeals' review of such refusal under Section 509(b). See *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F. 2d 654, 666–667 (C.A.D.C.); *Kesinger* v. *Universal Airlines, Inc.*, 474 F. 2d 1127, 1132 (C.A. 6).

[59] Petitioners contend (Br. 94–96) that if this Court holds that the courts of appeals have no jurisdiction to review the Administrator's establishment of effluent limitations under Section 301 (b), it nevertheless should allow to stand the court of appeals' action in this case in setting aside parts of those limitations. (Except for the one issue involved in the government's petition in No. 75–1705, the government has not sought review of those modifications.) The argument rests upon the court of appeals' admitted jurisdiction under Section 509(b)(1)(A), 33 U.S.C. (Supp. V) 1369(b)(1)(A), to review effluent limitations for new sources, which the statute terms "standards of performance." Petitioners invoked that jurisdiction in their petition to review in this case, which challenged the Administrator's effluent limitations for both new and existing sources. They note that both sets of limitations, as well as the guidelines for existing sources, are based upon the same record made in a single proceeding and that the validity of all three involves interrelated factual and legal issues. They conclude that the court of appeals' modifications of the effluent limitations under Section 301 can be upheld as a proper exercise of its pendent jurisdiction exercised in connection with its review of new source effluent limitations established under Section 306, under such cases as *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 216, n. 16, and *Romero*

respect in which the Administrator is challenging that judgment in No. 75–1705.

Respectfully submitted.

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v. *International Terminal Co.*, 358 U.S. 354, 380–381. Cf. also *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 216, 226–227.

As noted, the government has not challenged those rulings of the court of appeals here. Moreover, it is important to the proper administration of the statute that there be a definitive determination of the validity of the effluent limitations in this industry as soon as possible. In the circumstances, we agree that it would be inappropriate to vacate the judgment of the court of appeals insofar as it made those modifications in the effluent limitations and remand the case to the district court to consider those issues. Not only would such a remand cause delay, but it would be a waste of time, since the district court undoubtedly would follow the vacated ruling of the court of appeals, to which any appeal from its decision would lie.

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